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No. 04-___

IN THE

Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), this Court held that, even in wartime, the designation of enemy combatants pursuant to the President's authority as Commander in Chief is subject to meaningful judicial review. In this case, petitioners seek just compensation under the Takings Clause of the Fifth Amendment for the destruction of a pharmaceutical plant that the President erroneously designated as enemy property and then attacked in 1998. In the decision below, the Federal Circuit dismissed petitioners' constitutional claim because, in its view, the political question doctrine bars any judicial review of enemy property designations. Accordingly, this case presents the following question:

> Whether the President has unreviewable authority to designate property as enemy property and then destroy it.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings below were the El-Shifa Pharmaceutical Industries Company, Salah El Din Ahmed Mohammed Idris, and the United States of America. The El-Shifa Pharmaceutical Industries Company has no parent company, and its shares are not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Salah El Din Ahmed Mohammed Idris and the El-Shifa Pharmaceutical Industries Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-41a) is reported at 378 F.3d 1346. The opinion of the United States Court of Federal Claims (App. 42a-96a) is reported at 55 Fed. Cl. 751.

JURISDICTION

The court of appeals entered judgment on August 11, 2004, and it denied petitioners' timely motion for rehearing or rehearing *en banc* on December 28, 2004. App. 97a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In August 1998, President Clinton ordered a cruise missile strike on a small pharmaceutical plant in Khartoum based upon the mistaken assumption that the plant was engaged in the production of chemical weapons for the al Qaeda terrorist network. In this case, the owners of the plant seek just compensation for the destruction of their property. Noting that the Takings Clause of the Fifth Amendment does not require compensation for the destruction of property owned or controlled by enemies of this country, the lower court dismissed petitioners' claim on the ground that the President's designation of their plant as enemy property raises a political question and is therefore immune from

judicial review. Because this ruling contradicts the Court's recent decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and misapplies the political question doctrine, the ruling below warrants review.

The El-Shifa Plant. By Western standards, the El-Shifa pharmaceutical plant was small and unsophisticated. Because it lacked the equipment needed to fabricate chemicals, the plant took pharmaceutical products purchased in bulk in Europe and packaged them into tablets, ointments, and other consumer goods. App. 46a, 99a-100a. The plant was nevertheless vitally important because it supplied a majority of the human and veterinary medicines in Sudan, one of the poorest countries in the world. App. 2a, 46a, 99a.

The Embassy Bombings and Destruction of the Plant. On August 7, 1998, terrorists associated with Osama bin Laden and the al Qaeda network simultaneously bombed the United States embassies in Kenya and Tanzania, causing massive destruction and widespread loss of life. App. 2a, 43a. Approximately two weeks later, the United States retaliated by attacking targets in Afghanistan and Sudan. The target in Afghanistan, an al Qaeda training camp, was selected because bin Laden was attending a meeting there that day. Another target, the El-Shifa plant, was attacked at the same time, reportedly because the Administration wanted to respond to the dual embassy bombings with simultaneous strikes on two al Qaeda targets. App. 43a-45a; *see also* James Risen, *Question of Evidence: A Special Report; To Bomb Sudan Plant or Not: A Year Later, Debate Rankles*, THE NEW YORK TIMES, Oct. 27, 1999, at A1.

The Clinton Administration's Shifting Justifications. On the day of the attack, President Clinton justified the destruction of the El-Shifa plant on the ground that al Qaeda was using the plant to produce chemical weapons. App. 2a-3a, 43a-45a, 103a-104a. This claim was quickly debunked by the press. Examining the ruins, reporters discovered that the plant had not been producing chemical weapons, and the

American and European engineers who helped to build and supply El-Shifa confirmed that the plant was not sophisticated enough to fabricate any chemicals at all. App. 47a, 105a-106a, 113a. Faced with this evidence, the Clinton Administration abandoned the claim that the plant was producing chemical weapons. App. 46a-47a, 106a-107a, 108a.

As a fallback, relying on a soil sample allegedly taken in late 1997, Administration officials asserted that the El-Shifa plant may have stored a substance used in producing chemical weapons. App. 108a-109a. They also asserted that the plant was indirectly owned by either bin Laden or a Sudanese government corporation with ties to him. App. 110a-112a. These assertions were also quickly debunked. Testing performed on the plant failed to uncover any traces of the substance allegedly stored there, App. 109a-110a, and the press learned that the plant was in fact owned by petitioner Salah Idris, a well-respected Saudi banker, originally from Sudan, who was an open opponent of the fundamentalist regime in Sudan and had no ties to bin Laden or terrorism. App. 46a-47a, 112a; *see also* RICHARD A. CLARKE, AGAINST ALL ENEMIES 189 (2d ed. 2004) (observing that there was no evidence linking Mr. Idris with terrorist activities).

After learning of his ownership of the plant, the Administration accused Mr. Idris of being an agent for bin Laden and froze his assets. App. 47a-48a, 113a-115a. But when Mr. Idris challenged these accusations in court, the Government refused to defend them and released his assets. App. 48a, 114a.

The Court of Federal Claims. On July 27, 2000, Mr. Idris and the El-Shifa Pharmaceutical Industries Company, the company through which Mr. Idris owns the El-Shifa plant, sued the United States government in the Court of Federal Claims, seeking just compensation under the Takings Clause for the destruction of the plant.

Petitioners alleged that the destruction of the plant was unjustified because no chemical weapons were manufactured or stored there, the plant had no ties to bin Laden or al Qaeda, and Mr. Idris has never been associated in any way with terrorism. App. 46a-48a, 104a-105a.

In response to these allegations, the Government moved to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and standing. App. 48a-49a. After this motion was briefed and argued, the trial judge requested supplemental briefs addressing the political question doctrine. Once this supplemental briefing was complete, the court entertained further briefing from the Government on the military necessity doctrine. App. 49a.

Throughout this briefing, petitioners challenged the Government to say whether it continued to believe that the El-Shifa plant was enemy property.[1] But the Government carefully refrained from stating its position on the accuracy of any of the claims made at the time of the attack. Instead, it relied upon the statements made by President Clinton at the time the plant was destroyed.[2] Although the press debunked those statements and forced the Administration to abandon them, the Government argued that the statements were conclusive and prevented the court from considering whether the El-Shifa plant was in fact enemy property. *See* App. 75a-76a.

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[1] *See, e.g.*, Plaintiffs' Reply Addressing the Political Question Doctrine and the Necessity Defense, *El-Shifa Pharmaceutical Indus. Co. v. United States*, No. 00-443L, at 10-11 (Fed. Cl. Jan. 22, 2002) (noting that "the Government's supplemental memorandum carefully avoids expressing any position" on whether the El-Shifa plant was connected with chemical weapons or al Qaeda).

[2] *See, e.g.*, Defendant's Supplemental Memorandum of Law Addressing the Political Question Doctrine and the Doctrine of Necessity in Support of Its Motion to Dismiss, *El-Shifa Pharmaceutical Indus. Co. v. United States*, No. 00-443L, at 8-9 (Fed. Cl. Jan. 15, 2002) ("the pertinent facts have been established by the statements of President Clinton").

The trial judge agreed, holding that the political question doctrine bars any review of President Clinton's initial designation of the El-Shifa plant as enemy property. App. 84a-88a. *But see* App. 49a-67a (rejecting the jurisdictional and standing arguments raised by the Government). Since the Takings Clause does not require compensation for the destruction of enemy property, the court concluded that petitioners had failed to state a valid claim under the Clause. App. 80a-84a. The court did not require the Government to respond to the allegations in the complaint or even to state whether it still believes President Clinton was correct in designating the El-Shifa plant as enemy property. *See* App. 88a.

The Federal Circuit. On appeal, the Federal Circuit, which had jurisdiction under 28 U.S.C. § 1295(a)(3), affirmed. Although it also rejected the Government's jurisdictional and standing arguments, App. 5a-13a, the court of appeals agreed not only that enemy property can be destroyed without compensation, but also that the political question doctrine barred judicial review of President Clinton's designation of the El-Shifa plant as enemy property. App. 2a, 14a-38a. Like the trial court, the court of appeals relied upon President Clinton's statements at the time of the attack and did not require the Executive Branch to state whether it continues to stand by those statements. *See* App. 31a-33a.

The court of appeals ruled that the President's designation raised an unreviewable political question because there is a "textually demonstrable constitutional commitment" of such designations to the Executive Branch. App. 24a, 26a-31a (internal quotation marks omitted). The court reasoned that, as Commander in Chief, the President is invested with the power to wage war, which includes "the power to make extraterritorial enemy property designations" because such designations are a crucial aspect of conducting war. App. 28a-29a.

Although the court of appeals recognized that the President's war powers are not all exclusive, it nevertheless concluded that the President's enemy property designations are unreviewable. The court expressed concern that, if courts were to review enemy property designations, they would be forced to formulate constitutional standards for evaluating the accuracy of military intelligence. App. 31a-33a. The court also asserted that judicial review of enemy property designations would interfere with combat operations. App. 33a-34a. Indeed, in the court's view, "'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . .'" App. 34a (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

Finally, the Federal Circuit attempted to reconcile its ruling with this Court's decision in *Hamdi v. Rumsfeld*, *supra*, which holds that enemy combatant designations are subject to meaningful judicial review. According to the court of appeals, this case involves a "fundamentally different set of facts" because the designation of the El-Shifa plant was "made in view of the President's 'go/no go' decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States." App. 38a. The court expressed no opinion concerning whether the President has similarly unreviewable power to "make enemy property designations over property that is located within the territory of the United States." App. 39a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HAMDI v. RUMSFELD*.

The decision below should be reviewed because it directly contradicts this Court's recent decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In fact, in holding that

enemy combatant designations are judicially reviewable, *Hamdi* rejected the very arguments adopted by the decision below.

In *Hamdi*, the father of an individual who was captured in the recent conflict in Afghanistan and designated as an enemy combatant challenged his son's detention. 124 S. Ct. at 2636-37. In response, the Government argued that the enemy combatant designation was conclusive, and the detention therefore lawful, for two reasons: (1) the Constitution gives the President exclusive authority as the Commander in Chief to make enemy combatant designations, and (2) permitting courts to review such designations would interfere with military operations. *See* Resp. Br., *Hamdi v. Rumsfeld*, No. 03-6696, at 25-26, 49 (U.S. Mar. 2004) (available at http://www.usdoj.gov/osg/briefs/2000/3mer /2mer/2003-6996.mer.aa.pdf). Indeed, the Government asserted that "'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . .'" *Id.* at 49 (quoting *Eisentrager*, 339 U.S. at 779). The Court rejected these arguments, holding instead that individuals detained as enemy combatants are entitled to a "meaningful opportunity to contest the factual basis for that detention." 124 S. Ct. at 2635.

The decision below contradicts this ruling because, in holding that the President's enemy property designations are unreviewable, the lower court adopted the arguments advanced and rejected in *Hamdi*. First, it noted that the President's authority to designate enemy property derives from his power as Commander in Chief to wage war. App. 26a-29a. Second, it found that this authority is exclusive because courts are not competent to formulate standards for evaluating military intelligence, and subjecting enemy property designations to judicial review would interfere with combat operations. App. 31a-34a. Indeed, in support of this latter point, the lower court quoted the same authority as the

Government had in *Hamdi*. *See* App. 34a ("'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts'") (quoting *Eisentrager*, 339 U.S. at 779).

The lower court's ruling cannot be reconciled with *Hamdi*. The decision below attempted to distinguish this case from *Hamdi* on the ground that the enemy property designation here was "made in view of the President's 'go/no go' decision regarding the use of force." App. 38a. The lower court did not, however, explain how this distinction makes any difference. Like the power to designate enemy combatants, the power to designate enemy property derives from the President's power as Commander in Chief to wage war, *compare supra* p. 7 *with* App. 26a-29a, and the lower court did not – and could not – explain why review of enemy property designations interferes with military operations more than review of enemy combatant designations. The Government pointed out on rehearing that *Hamdi* involved liberty rather than property rights. *See* Opposition to Petition for Rehearing and Petition for Rehearing *En Banc*, *El Shifa Pharmaceutical Indus. Co. v. United States*, No. 03-5098, at 3-4 (Fed. Cir. Dec. 2, 2004). It failed, however, to explain why this fact makes any difference when the Constitution protects both liberty and property rights, and the political question doctrine was invoked based upon the authority committed to the President, not the rights affected by his exercise of that authority. *See* App. 26a-29a. Thus, the conflict between the decision below and this Court's decision in *Hamdi* is intractable.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR JUDICIAL REVIEW OF ENEMY PROPERTY DESIGNATIONS.

In addition to conflicting with *Hamdi*, the decision below misapplied the political question doctrine. It is well-settled that courts may review takings claims arising out of military

operations and enemy property designations made by the Executive Branch without interfering with Executive authority.

The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). In most situations, the powers of the Courts, Congress, and the President overlap, creating checks and balances that protect individual rights and other constitutional values. *See, e.g.*, THE FEDERALIST Nos. 47, 48, 51 (James Madison). Thus, when the President exercises the power granted him by the Constitution, courts are normally able – and, indeed, constitutionally obliged – to review whether that conduct complies with the restrictions imposed by Congress and the Constitution. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990). Sometimes, however, a claim of statutory or constitutional violation will raise a "political" question that courts cannot consider because resolution of the question "is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004) (plurality op.).

The political question doctrine does not apply here. Takings claims clearly raise constitutional rights that are judicially enforceable, *see, e.g., First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304 (1987), and resolution of petitioners' takings claim is not entrusted to the Executive Branch merely because it arises out of military operations. In *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 150-51 (1953), the owners of oil terminal facilities brought a takings claim based upon the destruction of those facilities by the army during the Japanese invasion of the Philippines in World War II. Although this Court rejected the claim, contrary to the lower court's theory, it did not refuse to consider it on the merits because the claim arose out of combat operations. Instead, the Court recognized that, even when dealing with claims arising out of combat operations, "[n]o rigid rules can be laid down to

distinguish compensable losses from noncompensable losses," and "[e]ach case must be judged on its own facts." *Id.* at 156. Thus, *Caltex* recognized that a takings claim arising out of military operations was entrusted to judicial, not Executive Branch, resolution.

Other cases have similarly recognized that courts may consider and resolve the merits of takings claims arising out of military operations. *See, e.g., Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92-94 (1969) (considering takings claim arising out of the destruction of buildings by American troops while quelling a riot in the Panama Canal Zone); *Juragua Iron Co. v. United States*, 212 U.S. 297, 306 (1909) (considering claim arising out of destruction of property in Cuba by American troops during the Spanish-American War); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-08, 1511-15 (D.C. Cir. 1984) (en banc) (considering claim arising from military's use of private ranch in Honduras for training El Salvadoran military), *vacated on other grounds*, 471 U.S. 1113 (1985); *Amer. Mfrs. Mut. Ins. Co. v. United States*, 453 F.2d 1380 (Ct. Cl. 1972) (considering claim based upon destruction of ship during battle with rebels in Dominican Republic); *Case of Wiggins*, 3 Ct. Cl. 412, 421-23 (1867) (awarding compensation for destruction of gunpowder by American naval ship in attack on pirate stronghold); *Grant v. United States*, 1 Ct. Cl. 41, 49 (1863) (awarding compensation for destruction of buildings and supplies to prevent capture by Confederate forces).

It makes no difference that the Government is basing its defense against petitioners' takings claim upon an Executive Branch determination that the property at issue here was enemy property. For at least two hundred years, courts have reviewed, and sometimes reversed, designations of enemy property made by naval officers in prize cases. *See, e.g., The Paquete Habana*, 175 U.S. 677, 713-14 (1900); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40, 50 (1826); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 489-90 (1806).

For the better part of a century, the Trading with the Enemy Act has authorized courts to review Executive Branch designations of enemy property. *See* Pub. L. No. 65-91, § 9, 40 Stat. 411, 419 (1917) (codified at 50 U.S.C. App. § 9). And less than a decade ago, Congress provided for judicial review of the freezing of assets based upon Executive Branch designations of terrorist supporters. *See* Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1249 (1996) (codified at 8 U.S.C. § 1189(b)); *see also supra* p. 3 (discussing Mr. Idris' successful challenge to his designation). Thus, both Congress and this Court have long recognized that courts can review enemy property designations made by the Executive Branch.

Nor does the threat of interfering with combat operations (App. 34a) compel a different conclusion. Review of enemy property designations is no more intrusive than the review of enemy combatant designations permitted in *Hamdi*. Moreover, the potential for such review would have little effect on military decisionmaking because, under the rules developed by the case law, takings claims arising out of combat operations are rarely available. As previously noted, takings claims cannot be based upon the destruction of enemy property, which is defined broadly to include all property of the citizens of enemy countries as well as all property located in enemy-controlled territory. *See, e.g.*, *Juragua Iron Co.*, 212 U.S. at 305-07. In addition, such claims cannot be based upon property destroyed unintentionally in attacks directed at other targets, *see, e.g.*, *United States v. Pacific R.R.*, 120 U.S. 227, 233-35 (1887), or upon property destroyed during military operations that have been kept secret, *see, e.g.*, *Guong v. United States*, 860 F.2d 1063, 1065-67 (Fed. Cir. 1988); *see also Tenet v. Doe*, 125 S. Ct. 1230, 1237-38 (2005). And where military forces act reasonably under imminent danger, the military necessity doctrine protects them against takings claims. *See, e.g.*, *Caltex*, 344 U.S. at 151-56; *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1870). Thus, a valid takings claim may

arise out of the destruction of property by military operations only in the presumably rare circumstance in which private property of a non-enemy located in a country at peace with the United States is openly and deliberately destroyed by military forces that are not responding to an imminent danger. The possibility of such an unusual claim will not adversely affect military decisionmaking.

Finally, even if the political question doctrine were relevant to enemy property designations, it would not bar review where, as here, the Executive has failed to state its position on the relevant facts. The question at issue in this case is not whether the Executive once believed the plant was enemy property involved in the production of chemical weapons, but whether it was so in fact, a question the Government has declined to answer, despite repeated challenges by petitioners. *See supra* pp. 4-5. In sharp contrast to *Hamdi*, where the Government submitted an affidavit affirming the enemy combatant designation at issue there, *see Hamdi*, 124 S. Ct. at 2636-37, in this case the Government has refused to state whether it contends that the El-Shifa plant was in fact enemy property for any of the reasons stated at the time of the attack. Thus, the lower court did not defer to the Executive Branch's judgment on whether the El-Shifa plant was enemy property; it allowed the Executive Branch to avoid disclosing and taking responsibility for its judgment. This is a plain misapplication of the political question doctrine.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PRESIDENT'S AUTHORITY TO DESTROY PRIVATE PROPERTY.

The petition presents an undeniably important question. The decision below held that the President has unreviewable authority to destroy private property by designating it as enemy property, even where the Government is later unwilling to affirm the correctness of that designation. In addition, although the lower court reserved the issue, there is

nothing in its reasoning limiting its ruling to property located abroad. To the contrary, the decision below gives the President effectively unlimited power to seize or destroy private property when he acts as Commander in Chief. The obvious danger this unprecedented ruling presents to protected property rights warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 24, 2005

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[Reported at 378 F.3d 1346]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5098

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Decided: August 11, 2004

Stephen J. Brogan, Jones Day, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were *Timothy J. Finn*, *Jonathan C. Rose*, *Daniel H. Bromberg* and *Julia C. Ambrose*. Of counsel was *Christopher J. Lovrien*.

Peter H. Oppenheimer, Attorney, Environment & Natural Resources Division, Policy, Legislation & Special Litigation Section, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were *Thomas L. Sansonetti*, Assistant Attorney General; and *Kathryn E. Kovacs*, Attorney.

Appealed from: United States Court of Federal Claims.

Judge Lawrence M. Baskir.

Before LOURIE, CLEVENGER, and SCHALL, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

El-Shifa Pharmaceutical Industries Company ("El-Shifa") and Salah El Din Ahmed Mohammed Idris ("Idris") (collectively "appellants") brought this suit seeking just compensation for the destruction of a manufacturing facility by the armed forces of the United States. The complaint

alleges that destruction of the appellants' facility constituted a taking of private property for public use within the meaning of the Fifth Amendment to the United States Constitution. The Court of Federal Claims concluded that the government's conduct did not rise to the level of a taking under the Fifth Amendment and dismissed the complaint accordingly. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (2003). For the reasons stated below, we hold that the appellants failed to allege a valid takings claim and therefore affirm the judgment of the Court of Federal Claims.

I

The complaint states that Idris is a highly successful Saudi banker who was born and raised in Sudan. The chain of events leading up to the instant lawsuit began in March 1998, when Idris purchased shares in El-Shifa, a corporation organized under the laws of Sudan, for $18 million. At the time, El-Shifa was the sole and exclusive owner of a manufacturing facility located in Khartoum, Sudan ("the Plant"). The appellants allege that El-Shifa was the largest pharmaceutical manufacturing company in Sudan and that it used the Plant to supply drugs sorely needed by the impoverished people living in that country.

On August 7, 1998, the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed in nearly simultaneous attacks that were linked to Osama bin Ladin and the terrorist organization al-Qaeda. On August 20, 1998, President William Jefferson Clinton ordered the armed forces of the United States to conduct strikes in Afghanistan and Sudan intended to "disrupt bin Ladin's terrorist network and destroy elements of its infrastructure" there. President's Radio Address, 2 *Pub. Papers* (Aug. 22, 1998). In particular, the stated purpose of the strikes was to "destroy, in Sudan, [a] factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." *Id.*

The day after the strikes, the President sent a letter to Congress in which he stated that the Plant was being used to produce chemical weapons. *See* Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 *Pub. Papers* (Aug. 21, 1998). The President stated the United States had acted in self-defense, and that the

> strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected because they served to facilitate directly the efforts of terrorists specifically identified with attacks on U.S. personnel and facilities and posed a continuing threat to U.S. lives.

Id. The President added that he ordered the strikes "pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander and Chief Executive." *Id.* Although bin Laden and al-Qaeda survived the strikes, the Plant was "substantially, if not completely, destroyed." *El-Shifa*, 55 Fed. Cl. at 754. The appellants aver that the Plant was destroyed by cruise missiles launched from American naval vessels operating on the high seas.

The appellants filed a complaint in the Court of Federal Claims on July 27, 2000, seeking $50 million in damages as compensation for the destruction of the Plant by the United States. The complaint contained a series of factual allegations denying assertions President Clinton and members of his administration made regarding the Plant's involvement in the production of chemical weapons as well as links between the appellants and al-Qaeda.

The government responded with a motion to dismiss the complaint challenging the appellants' standing to sue as well as the jurisdiction of the Court of Federal Claims to entertain their takings claim. The government argued first, that the appellants' complaint should be dismissed because

nonresident aliens do not have standing to sue the government for an alleged taking absent a substantial voluntary connection between the United States and the claimants or their property. Second, the government characterized any injury the appellants may have suffered during the strikes as a maritime tort over which the Court of Federal Claims lacked subject matter jurisdiction. Third, the government argued that the appellants failed to satisfy the specific requirements of 28 U.S.C. § 2502, which limits the jurisdiction of the Court of Federal Claims over suits brought by aliens to those in which United States citizens enjoy a reciprocal right to sue the alien's home nation in its home courts.

After oral argument on the government's motion, the court ordered the parties to file additional briefing addressing the justiciability of the appellants' claim in light of the Supreme Court's political question doctrine and the applicability of the Takings Clause of the Fifth Amendment to the governmental conduct described in the complaint. *El-Shifa*, 55 Fed. Cl. at 755. Ultimately, the government briefed fully its contention that the political question and military necessity doctrines counseled in favor of dismissal. *Id.*

The Court of Federal Claims rejected the three original grounds for dismissal, but nevertheless ruled in the government's favor on the ground that the Takings Clause did not apply to the facts alleged in the complaint. *See id.* at 755-56 (stating that "the Takings Clause does not extend to claims arising out of military operations against enemy war-making instrumentalities"). The court determined that the property in question in this case was transformed into enemy property by the President, *see id.* at 771, and it determined that the President's designation was conclusive in light of his constitutional role as Commander-in-Chief, *see id.* at 772. The court concluded that it could "not look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what

constitutes an enemy target and his determination to use military force to destroy that target." *Id.* at 774.

The Court of Federal Claims entered judgment in the government's favor on March 14, 2003 and denied the appellants' motion for reconsideration. The appellants timely appealed the court's decision to this court. We have jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 1295(a)(3).

II

The appellants' assertion that the Court of Federal Claims erred when it dismissed their complaint for failing to state a claim upon which relief can be granted raises a question of law that we review *de novo*. *See Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000). In reviewing a decision to dismiss for failure to state a claim we must assume that all the well-pled factual allegations in the appellants' complaint are true, and we draw all reasonable inferences in their favor. *See Leider*, 301 F.3d at 1295. The government's contention that the Court of Federal Claims erred when it rejected its motion to dismiss for lack of subject matter jurisdiction also raises a question of law warranting *de novo* review. *See Boyle*, 200 F.3d at 1372; *Moyer v. United States*, 190 F.3d 1314, 1317-18 (Fed. Cir. 1999).

III

On appeal, the government raises anew its three original grounds for dismissal of the appellants' complaint. Like the Court of Federal Claims, we think none of these grounds provides a firm basis supporting entry of judgment in favor of the United States.

A

The government's first ground raises the issue of whether the Takings Clause reaches property owned by a nonresident alien located beyond the shores of the United States. The government argues that it does not if the nonresident alien or

his property lacks a substantial voluntary connection to the United States. The appellants oppose the government's characterization of the Takings Clause in this respect and respond by stating, in part, that the "Takings Clause imposes an absolute and unqualified restriction upon government conduct . . . [that] is derived from a theory of 'natural law' and based upon a natural right to private property which is universal in nature, not dependent on citizenship, and a fundamental principle of international law . . . ." Appellants' Reply Br. at 20.

The Takings Clause tersely states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. To be sure, the text of the Takings Clause does not qualify what is meant by "private property" or indicate that it must be located in this country. Nor does the text say that only American citizens may receive just compensation. Accordingly, the parties agree that a complaint does not have to allege that the government has appropriated property physically located in the United States in order to state a valid takings claim. *See Turney v. United States*, 115 F. Supp. 457, 464-65 (Ct. Cl. 1953) (rejecting argument that Takings Clause did not apply to property located in a foreign country); *Seery v. United States*, 127 F. Supp 601, 602-03 (Ct. Cl. 1955) (rejecting government's argument that takings claims should be dismissed because private property at issue was located in Austria). They also agree that a claimant does not necessarily have to aver that he is a United States citizen or resident alien in order to make out a valid takings claim if his property is located in the United States. *See Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931) (holding Takings Clause reached the claim of nonresident alien friend whose property the government seized when it was located in the United States).

The parties disagree, however, over the legal implication of the particular facts of the instant case, where the claimant is a nonresident alien lacking substantial voluntary

connection to this country *and* the allegedly taken property was situated on foreign soil. In the government's view, this combination sounds the death knell for the appellants' claim. The government relies on the Supreme Court's decision in *Verdugo-Urquidez v. United States*, 494 U.S. 259, 274-75 (1990), where the Court held that the Fourth Amendment did not apply to the warrantless search of a Mexican citizen's home in Mexico in connection with a criminal investigation. The petitioner in *Verdugo-Urquidez* argued that the Fourth Amendment's prohibition on unreasonable searches applied to and prohibited the search because the Court had in the past held that nonresident aliens enjoy certain rights under the Constitution. *Id.* at 270-71. Among these rights was the right to just compensation for property taken by the United States. *Id.* at 271 (citing *Russian Volunteer Fleet*, 282 U.S. 481). The Court rejected this argument and stated that:

> These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country. . . . Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

Id. (citations omitted).

The appellants respond with authority from our predecessor court, *Turney v. United States*, in which the court held that the seizure by the United States of radar equipment located in the Philippines, owned at the time by a Philippine corporation, constituted a taking for which just compensation was owed. *Turney*, 115 F. Supp. at 463-64. Although the *Turney* court did not specifically inquire into the substantial connections of the corporation or its property to the United States, it did reject the government's argument that the Takings Clause lacked extraterritorial application.[1]

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[1] We note, only in passing, that the court's opinion indicates that the allegedly taken radar equipment once belonged to the United States and

Id. at 464. Nevertheless, in the appellants' view, *Turney* binds us, and it stands for the proposition that the Takings Clause protects the property interests of nonresident aliens located abroad even where there is no demonstrable connection between them or their property and the United States.

The parties present us, on the one hand, with *Turney*, which counsels in favor of extending the protections of the Takings Clause to the appellants without regard to the absence of allegations of substantial voluntary connections to the United States in their complaint. On the other hand, we are offered a reading of Supreme Court precedent that purportedly overrules *Turney* and instead suggests that the appellants would have to establish stronger voluntary connections to this country before they would be entitled to benefit from the protections its Constitution provides. When presented with this same choice, the Court of Federal Claims determined that the *Verdugo-Urquidez* Court extended the substantial connections test to the Takings Clause of the Fifth Amendment, but that it was nevertheless bound by the doctrine of *stare decisis* to follow the rule of *Turney*. *See El-Shifa*, 55 Fed. Cl. at 764. Indeed, the court invited us to overrule *Turney* if we agreed with its reading of *Verdugo-Urquidez*.

We are hesitant to accept this invitation to the extent that it asks us to expressly overrule *Turney*. "We cannot simply overrule the [*Turney*] decision, even if we were persuaded . . . that it is appropriate; to overrule a precedent, the court must rule en banc." *George E. Warren Corp. v. United States*, 341 F.3d 1348, 1351 (Fed. Cir. 2003) (citing *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988)). Moreover, because we think the appellants' takings claim at bottom presents a nonjusticiable political question,

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that the Philippine corporation was closely held by a small group of shareholders that included two former members of the United States Air Force. *See Turney*, 115 F. Supp. at 458-59.

we are not required to explore whether *Turney* enjoys any continuing vitality after *Verdugo-Urquidez* in order to affirm the decision on appeal. Accordingly we decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States.

B

We find the government's second original ground for dismissal to be without merit. In their complaint, the appellants include a number of allegations disputing the accuracy of the President's determination that, *inter alia*, the appellants were using the Plant to produce chemical weapons ingredients for al-Qaeda. The government argues that the appellants' claim is, at its core, that the President acted negligently when he designated the Plant for destruction, and that any theory of recovery based on this conduct necessarily sounds in tort. Therefore, the government concludes, the appellants' claim cannot be within the jurisdiction of the Court of Federal Claims. *See* 28 U.S.C. § 1491(a)(1) (divesting Court of Federal Claims of jurisdiction in cases sounding in tort). The government asserts further that the alleged tortious behavior is maritime in character because it involved the launch of cruise missiles from vessels at sea, and therefore, jurisdiction over the appellants' claim lies properly with the federal district courts. *See* 28 U.S.C. § 1333(1) (2000) (granting exclusive and original jurisdiction to federal district courts over civil cases in admiralty and maritime jurisdiction).

Although the complaint does recite a series of allegations contradicting the purported links between Idris, the Plant, and international terrorism, we read it to ask the Court of Federal Claims to remedy a taking, not a tort. Granted, these allegations, if true, would impugn the President's characterization of the Plant as a chemical weapons factory. The United States may, or may not, have acted negligently in

targeting the Plant for destruction. However, this was not for the Court of Federal Claims to decide, nor is it for us. That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims. To the contrary:

> If the government appropriates property without paying just compensation, a plaintiff may sue in the Court of Federal Claims on a takings claim regardless of whether the government's conduct leading to the taking was wrongful, and regardless of whether the plaintiff could have challenged the government's conduct as wrongful in another forum.

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363 (Fed. Cir. 1998); *see also Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) ("[A] takings claim lies, as long as the government's action was authorized, even if the government's action was subject to legal challenge on some other ground.").

As we have explained, an allegation that the government has taken property in a legally improper manner states "two separate wrongs [that] give rise to two separate causes of action." *Rith Energy*, 247 F.3d at 1365 (quoting *Del-Rio Drilling*, 146 F.3d at 1364) (alteration in original). Under such circumstances, the plaintiff "is free either to sue in district court for asserted improprieties committed in the course of the challenged action or to sue for an uncompensated taking in the Court of Federal Claims." *Id.* (citing *Del-Rio Drilling*, 146 F.3d at 1364). The appellants have indeed filed an administrative claim and a lawsuit in federal district court (filed on April 4, 2001) based on the same allegations found in the instant complaint.[2] *See El-*

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[2] Ever mindful of this court's duty to attend to its own jurisdiction, *see Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003), we consider whether the appellants' later filing in federal district court ousted the Court of Federal Claims of jurisdiction over their takings claim under 28 U.S.C. § 1500 ("section 1500"). Section 1500 states, in pertinent part,

Shifa, 55 Fed. Cl. at 754. With this in mind, it is understandable why the Court of Federal Claims stated that the appellants had filed a "multipurpose" complaint. *Id.* The multipurpose nature of the complaint did not deprive the Court of Federal Claims of jurisdiction to entertain the takings claim alleged therein.[3]

We also reject the government's argument concerning the implication that the maritime nature of the government's conduct has for jurisdiction in the Court of Federal Claims. Given that the appellants state a claim for takings, the government's argument boils down to nothing more than assertion that a takings claim with maritime overtones must necessarily fall within the maritime jurisdiction of the federal district courts. This argument lacks merit. A taking consummated at sea is nevertheless a taking. As such, the Court of Federal Claims is the proper forum in which such cases are to be adjudicated. The appellants' allegation that

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that: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . . ." We determine "whether another claim is 'pending' for purposes of § 1500 . . . at the time at which the suit in the Court of Federal Claims is filed[.]" *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1548 (Fed. Cir. 1994) (*en banc*). Accordingly, the appellants did not vitiate the jurisdiction of the Court of Federal Claims over their first complaint by later filing the same claim in federal district court. *See Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943, 946 (Ct. Cl. 1965) (rejecting argument that plaintiff ousted Court of Claims of jurisdiction by later filing the same suit in federal district court); *see also Hardwick Bros. Co. v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995) (confirming that the *Tecon Engineers* exception to section 1500 is still good law); *Dico, Inc. v. United States*, 48 F.3d 1199, 1203 (Fed. Cir. 1995) (same); *Loveladies Harbor*, 27 F.3d at 1549 (same).

[3] Because we conclude that the appellants' complaint states a takings claim falling within the jurisdiction of the Court of Federal Claims, we need not address the government's argument that the Supreme Court's tests for finding federal district court jurisdiction over maritime torts have been satisfied in this case. *See* Br. of Appellee at 45-53.

the United States used its Navy to launch projectiles that destroyed their Plant does not divest the Court of Federal Claims of jurisdiction to entertain their takings claim.

C

The government's third original ground for dismissal is its weakest. Section 2502 of Title 28 states that:

> Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

28 U.S.C. § 2502 (2000). Section 2502, known as the Reciprocity Act, burdens alien plaintiffs who invoke the process of the Court of Federal Claims with showing that their home courts treat natives and American citizens equally when they adjudicate claims brought against their home countries. *See Ferreiro v. United States.*, 350 F.3d 1318, 1322 (Fed. Cir. 2003) ("Equal treatment is the paramount requirement of the Reciprocity Act.").

The appellants met this burden in the proceedings before the Court of Federal Claims. They introduced evidence tending to show that in law, and in practice, American citizens may sue the Sudanese government on equal terms with Sudanese citizens. Based on this evidence, the Court of Federal Claims concluded that the "Constitution of the Republic of the Sudan guarantees for all persons the right to prosecute claims against the government." *El-Shifa*, 55 Fed. Cl. at 756. The thrust of the government's evidence in support of its motion to dismiss suggested that the Sudanese courts have lost their independence and are beholden to Islamic religious law. *Id.* As such, the government asserted, they are instruments of discrimination against non-Muslims. *Id.*

The Court of Federal Claims was correct to require a greater showing from the government in order to defeat the

appellants' *prima facie* showing of reciprocity. *See id.* at 758. Although the government's evidence suggested that pro-Muslim political elements probably wield undue influence on the courts of Sudan, we have recently held that "political interference alone on the part of the foreign sovereign will not serve to defeat a claim of reciprocity." *Ferreiro*, 350 F.3d at 1325. Moreover, there was no evidence in the record that the non-Muslim Sudanese were any better off than non-Muslim Americans in Sudanese courts. Such evidence was necessary if the government's arguments regarding the influence of Muslim law on the Sudanese courts were to have any probative value on the issue of reciprocity.

On appeal, the government argues that blanket provisions of the Sudanese constitution guaranteeing to all people equal treatment before and equal access to the Sudanese courts were suspended in 1999, and therefore, the appearance of reciprocity in the appellants' evidence is likely illusory. Even if this disputed fact, which apparently was not before the Court of Federal Claims, were true, we think it would bolster rather than undermine a finding of reciprocity. As blanket provisions that apply to "all people," the legal consequences of their repeal would apparently apply equally to Sudanese as well as American citizens. The government does not contend that the provisions were repealed only insofar as they had previously applied to American citizens. We think such evidence would be critical if repeal of these provisions were to evince disparate treatment adverse to American citizens tending to undermine the appellants' reciprocity allegation. *See id.* at 1322 ("[T]he Reciprocity Act 'contemplates only that American citizens enjoy an equal standing with foreigners in actions against the foreign State' and does not require the existence of an action against the foreign state of identical nature or scope." (quoting *Nippon Hodo Co. v. United States*, 285 F.2d 766, 767-68 (Ct. Cl. 1961))).

IV

Having disposed of the government's three original arguments in favor of dismissal, we now consider its contention that the Takings Clause does not reach the class of Executive conduct that led to the destruction of the Plant.

A

The appellants do not contend, nor could they, that the Takings Clause can be successfully invoked against all military conduct that results in the appropriation or destruction of private property. Rather, they concede at the very outset of their argument to this court that the "just compensation requirement does not apply to 'enemy property.'" Appellants' Opening Br. at 2. In its opinion, the Court of Federal Claims noted that the appellants admitted the same in the proceedings before it and that they stated further that "no takings claim could arise out of the destruction of property in any country that *actually* belongs to an enemy of the United States . . . ." *El-Shifa*, 55 Fed. Cl. at 767. That the United States does not have to answer under the Takings Clause for the destruction of enemy property or, as the Court of Federal Claims termed it, "enemy war-making instrumentalities," is to us a concept so manifest that it hardly requires further elaboration. A contrary rule that, by way of example, would require the government to provide compensation for the destruction of a vehicle (a tank, jet, etc.) used to engage United States armed forces in battle, strikes us as absurd in the extreme.

However, it is equally true that the government does not avoid the Takings Clause by simply using its military forces as cover for activities that would otherwise be actionable if performed by one of its civilian agencies. Military conduct that does not touch on the destruction or appropriation of enemy property can sometimes give rise to a valid takings claim. *See, e.g., Argent v. United States*, 124 F.3d 1277, 1281-85 (Fed. Cir. 1997) (holding that a private property owner may state a valid taking claim arising from military

aircraft overflights). In such cases, the military merely carries out the sovereign's eminent domain prerogative which, under our Constitution, the United States may not exercise without providing just compensation.

Thus, military takings cases often ask courts to ascertain the precise point at which the military conduct complained of is no longer coextensive with the state's civil power of eminent domain, but rather, enters the zone of conduct, outside the reach of the Takings Clause, where the United States appropriates the property of its enemies. *Cf. Nat'l Bd. of YMCAs v. United States*, 396 F.2d 467, 470 (1968) ("It is axiomatic that the fifth amendment is not suspended in wartime, but it is equally well recognized that a destruction of private property in battle or by enemy forces is not compensable."). In order to decide whether the facts of any particular military takings case paint a picture cognizable as a compensable taking under the Fifth Amendment, courts have

> look[ed] to the general principles announced in the decisional law to find the narrow and sometimes indistinct line that separates losses that are necessary incidents of the ravages and burdens of war from those situations where the Government is obliged to pay compensation to the owner of private property that is taken for public use.

Id. at 471.

The decision of the Court of Claims in *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd* 79 U.S. 315, 316 (1870), is a seminal case in that decisional law. While the phrase "enemy property" seems to have its origins as a term of art for prize courts,[4] *Perrin* was the first case in which the outlines of an enemy property doctrine applicable to takings jurisprudence can be recognized. The facts of *Perrin* concerned the destruction of private property that resulted

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[4] *See The Prize Cases*, 67 U.S. (2 Black) 635, 674 (1862) (stating "enemies' property" is "a technical phrase peculiar to prize courts . . .").

from the razing of the city of Greytown, Nicaragua, on July 13, 1854, by a United States naval vessel. *Id.* at 546-47. With the discovery of gold in California, safe passage from the Eastern States to that territory through Central America became a matter of strategic importance for the United States. *Id.* at 546. The court's opinion in *Perrin* suggests that the trip through Greytown was a hazardous one. The property of American citizens traveling to California was frequently taken and destroyed by townspeople, often with the support and at the behest of the local government. *Id.*

The diplomatic efforts of the United States to put an end to these disruptions were to no avail. An appeal to the national government of Nicaragua and the dispatch of an emissary to Greytown failed to end the attacks. *Id.* Consequently, the President decided to send the Cyane, a sloop of war commanded by one Hollins, to press the nation's grievances. *Id.* Commander Hollins delivered an ultimatum demanding recompense for the taken property and an apology on pain of attack. *Id.* at 546-47. The ultimatum went unheeded, and Commander Hollins ordered Greytown destroyed. The operation was a complete success. *Id.* at 547.

The Greytown affair resulted in the destruction of valuable merchandise owned by the Perrins, neither of whom were personally hostile to the United States. *Id.* at 546. They sued the United States in the Court of Claims for the value of the merchandise under a theory of takings. The court observed initially that:

> No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals domiciled in the country of its enemy, which its forces may chance to destroy in its operations against such enemy.

Id. at 547-48. As for non-hostile claimants such as the Perrins, whose only offense was to have physically located

their property within the shores of enemy territory, the court held:

> [O]ne who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chose to reside; and his only claim, if any, is a personal one against the government of that country in which his own sovereign will not interest himself.

Id. at 548. Accordingly, the court dismissed the Perrins' complaint as their property was located in Greytown, a foreign place hostile to the United States, and it was therefore rightly designated as enemy property subject to destruction. *See Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06 (1909) (finding no compensable taking where government destroyed suspected source of infectious disease located on enemy soil); *Seery*, 127 F. Supp. at 605-06 (rejecting government's enemy property defense because property belonging to military takings claimant was actually located in friendly territory when it was taken).

The Supreme Court applied enemy property doctrine to a number of military takings cases that followed *Perrin*. *United States v. Pacific Railroad Co.*, 120 U.S. 227, 228-31 (1887), concerned the destruction of a number of bridges by Union forces operating in Missouri during the Civil War. The claimant, Pacific Railroad Company, provided certain transportation services to the government during the war for a fee that had remained unpaid since the cessation of hostilities. *Id.* at 228. The railroad brought a lawsuit against the United States to recover the fee. *Id.*

Also during the war, Union forces determined they could impede the advance of the Confederate Army through the area if they destroyed several of the railroad's bridges. *Id.* at 229. The military destroyed a number of bridges, and thereafter it repaired all of them except four. *Id.* The Court's opinion suggests that what bridges the military

repaired, it did so in order to facilitate the advance of its own forces throughout the theater of operations. *Id.* at 231-32. In responding to the railroad's demand, the government argued that the trial court should have offset any monies it may have owed the railroad by an amount equal to the cost of these repairs. *Id.* at 229, 232.

The Court reversed the decision of the Court of Claims granting the offset. *Id.* at 240. In so doing, the Court addressed the nature and scope of the parties' obligations to each other that may have arisen from their conduct during the war. The Court concluded that the railroad had no obligation to offset the government's debt. In its view:

> [P]rivate parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government.

Id. at 239. The government was to bear alone the burden of constructing the roads and bridges it needed to move troops and supplies. *Id.* Granting its request for an offset would be tantamount to impermissibly placing on the railroad that portion of the burden of moving troops through the battlefield represented by the government's bridge reconstruction costs.

The Court also addressed, at length, the existence of any obligation of the government to the railroad under the Takings Clause. *Id.* at 233-39. It relied on the enemy property doctrine to conclude that the railroad could not hold the government liable in takings for the destruction of any of its bridges. In the Court's view, a state of war unquestionably existed in Missouri at the time Union forces destroyed the railroad's bridges—a war in which:

> More than a million of men were in the armies on each side. The injury and destruction of private property

> caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction.

Id. at 233-34. Although, as the Court observed, individuals over the years had petitioned Congress for compensation for the loss of property suffered at the hands of the military under similar circumstances, that body had never granted any such claim. *Id.* at 235-39. Indeed, by the time *Pacific Railroad* was decided, "[t]he principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible[, was] established." *Id.* at 239.

However settled the doctrine may have been, it was not boundless. Rather, the *Pacific Railroad* Court explained instead that the government could not use the enemy property doctrine to shield itself from takings liability when:

> [P]roperty of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war or buildings to be used as store-house [sic] and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such

> cases, it has been the practice of the government to make compensation for the property taken.

Id. at 239; *see also United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) (holding that the United States owed private takings claimant just compensation for requisitioning three steamboats to ferry Union soldiers during Civil War). In such cases, the military acted pursuant to the state's power of eminent domain, and the government could justifiably be charged with paying just compensation as a result.[5]

To be sure, the Court's exegesis, which distinguished between the military's civil functions (requiring just compensation) and its war-making functions (which the enemy property doctrine immunized from takings liability) was not strictly necessary to answer the precise question presented, *i.e.*, whether the law obligated the railroad to reimburse the government for reconstructing four of its destroyed bridges. However, nearly seventy years later, the Court confirmed that the *Pacific Railroad* Court's discussion of the enemy property doctrine was in fact the law of the land. *See United States v. Caltex (Phil.), Inc.*, 344 U.S. 149,

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[5] The Court has in the past relied alternatively on a theory of implied contract to find compensable takings, especially in those cases where "property of loyal citizens is taken for the service of our armies." *See Pac. R.R.*, 120 U.S. at 239 (stating that the obligation to pay just compensation in such cases is "supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use," but nevertheless, the military's seizure and appropriation of property in these instances "may not be within the terms of the constitutional clause"); *Russell*, 80 U.S. (13 Wall.) at 630 (explaining that government's obligation to pay for use of steamboats to ferry troops was founded upon implied promise to compensate their owner for the services he rendered); *see also Nat'l Bd. of YMCAs*, 396 F.2d at 471 (discussing *Russell* and other cases where courts have found compensable military takings and suggesting that "the property in those cases was requisitioned in a manner much akin to the procurement of goods and services under contract—in the absence of immediate danger, after deliberation, and for a somewhat later and less temporary use").

154 (1952) ("[W]hether or not the principle laid down by Mr. Justice Field [in *Pacific Railroad*] was dictum when he enunciated it, we hold that it is law today.").

Caltex presented the Court with a military takings claim brought by three oil companies that owned oil terminal facilities in the Philippines when Pearl Harbor was attacked on December 7, 1941. *Id.* at 150. After the attack, and in advance of the Japanese invasion of Manila, United States forces determined that it was necessary to destroy the companies' facilities as well as the oil stored therein so that they might not fall into enemy hands. *Id.* at 150-51. The Army carried out the destruction of the property as the Japanese were entering the city, thereby depriving them of a "valuable logistic weapon." *Id.* at 151.

The companies relied on two Civil War era cases to support their argument that the government ought to pay them just compensation as a consequence. The first, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852), presented a military takings claim arising from the Mexican and American War. During that war, it was the government's policy to permit merchants to follow the military into Mexican territory to trade with the inhabitants residing there. *Id.* at 132-33. It was thought this would "conciliate" the Mexican provinces and thereby "weaken the power of the hostile government of Mexico, with which we were at war." *Id.* at 133. Plaintiff Harmony was a trader who followed the United States forces as they moved into New Mexico. At one point, Harmony was forced to follow against his will, and ultimately, the military used his wagons and mules in the battle of Sacramento and in a subsequent march deeper into Mexican territory. *Id.* at 128-30. Indeed, the Court noted that the military had taken Harmony's property for no other reason than to "insure the success of [this] distant and hazardous expedition." *Id.* at 135. Under such circumstances, the Court held that the law did not permit the military to use Harmony's property without paying just compensation. *Id.* at 136. The Court determined

further that the same result would obtain even if the military had appropriated Harmony's property in order to prevent it from falling into the hands of the enemy. In that regard, the Court stated that, "[t]here are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy . . . . Unquestionably, in such cases the government is bound to make full compensation to the owner[.]" *Id.* at 134.

The second case, *United States v. Russell*, held that the government was bound to compensate a takings claimant whose steamboats the military impressed in order to ferry Union troops during the Civil War. *Russell*, 80 U.S. (13 Wall.) at 628-29, 632. In language that was noted in *Caltex*, *see* 344 U.S. at 152-53 n.3, the *Russell* Court suggested that in all cases where the government is shown to have taken private property "in time of war or immediate and impending public danger," "the government is bound to make full compensation to the owner[,]" *see Russell*, 80 U.S. (13 Wall.) at 628 n.6 (relying on *Mitchell*, 54 U.S. (13 How.) at 134).

The *Caltex* Court rejected the oil companies' arguments based on *Mitchell* and *Russell* and held the government was not liable to them for the value of the destroyed oil storage facilities. *Caltex*, 344 U.S. 154-56. The Court determined that the language in those cases lending support to their takings claim was in fact "far broader than the[ir] holdings," and that both cases had only required the Court to adjudicate takings claims concerning "equipment which had been impressed by the Army for subsequent use by the Army." *Id.* at 152-53. In neither case did the military "destroy[] property of strategic value to prevent the enemy from using it to wage war the more successfully." *Id.* at 153. Rather, the property at issue in *Caltex* was enemy property subject to destruction by the government under the doctrine set forth in *Pacific Railroad*. *Id.* at 154, 156. As the Court explained,

> The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy. The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.

Id. at 155-56 (footnote and citations omitted).

The role of the judiciary in much of our precedent in the area of military takings, including the cases we discussed above, has been to draw a "thin line . . . between sovereign immunity and governmental liability." *Nat'l Bd. of YMCAs*, 396 F.2d at 472. The instant case is unique however in military takings jurisprudence, in that we are not asked to determine on which side of that line the governmental conduct at issue falls. Indeed, under our precedent, if it were actually true in 1998, as the government then maintained, that the nation's terrorist enemies were using the Plant to manufacture chemical weapons destined for use against American citizens and interests around the globe, then the appellants' property loss would be subsumed by the enemy property doctrine, and that would be the end of it. Accordingly, today, we need not further sharpen the line that separates private property lost to the "fortunes of war" from that the military takes pursuant to the state's power of eminent domain.

This case asks us to draw a line of a different sort. The complaint filed by the appellants challenges the government's designation of the Plant as enemy property by, *inter alia*, suggesting that the President relied on flawed intelligence in targeting it for destruction. It is replete with allegations contradicting the government's, indeed the

President's, determination that the Plant was part of Osama bin Laden's array of weapons deployed against Americans at home and abroad. For the reasons set forth more fully below, we think the power set forth in Article III, section 1 of the Constitution does not encompass judicial supervision over the President's designation as enemy property the private property belonging to aliens located outside the territory of the United States.

B

Without question, "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "Sometimes, however, the law is that the judicial department has no business entertaining [a] claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'nonjusticiable' or 'political questions.'" *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004) (citations omitted).

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court set forth six tests for the presence of a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See also Nixon v. United States, 506 U.S. 224, 228-36 (1993) (finding in the Constitution a textual commitment of

impeachment proceedings to the Senate and House of Representatives); *United States v. Munoz-Flores*, 495 U.S. 385, 389-96 (1990) (holding adjudication of Origination Clause challenges by the federal courts do not evince lack of respect due political branches of government or lack any judicially manageable standards); *Davis v. Bandemer*, 478 U.S. 109 (1986) (concluding political gerrymandering claims are susceptible to resolution with a judicially discoverable and manageable standard), *questioned in Vieth*, 124 S. Ct. at 1776-92 (discussing reasons for plurality's desire to overrule *Davis*). Recently, the Court indicated that the *Baker* Court "probably listed [the six tests] in descending order of both importance and certainty." *Vieth*, 124 S. Ct. at 1776.

The decision that a question is nonjusticiable is not one courts should make lightly. Although each *Baker* test is independent, *id.*, we must satisfy ourselves that at least one of the six *Baker* tests is inextricably present in the facts and circumstances in this case before we may conclude that it presents a nonjusticiable political question, *Baker*, 369 U.S. at 217. This is so because courts should not use the political question doctrine to avoid deciding cases with political overtones or questions that they might categorize simply as "political." *See id.* (calling for discriminating inquiry and admonishing "semantic cataloguing" in political question cases). Over the appellants' arguments to the contrary, we conclude that the facts and circumstances of this case satisfy the first *Baker* test for the presence of a nonjusticiable political question.

C

The "issue" presented here, for purposes of deciding whether there is "a textually demonstrable commitment of the issue to a coordinate political department," is the inherent power *vel non* of the President to designate as enemy property the private property of an alien that is situated on foreign soil. Whatever inherent power the President may have to make such designations must emanate from the

Constitution. *See Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) ("Congress and the President, like the courts possess no power not derived from the Constitution."). The Constitution grants to the President the "executive Power," *see* U.S. Const. art. II, § 1, cl. 1, and requires that he "take Care that the Laws be faithfully executed," *id.*, art. II, § 3. The President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States." *Id.*, art. II, § 2, cl. 1.

The appellants take these passages of the Constitution at face value and find lacking in them a "textually demonstrable commitment in the Constitution of the question of the enemy status of property under the Takings Clause to the Executive Branch." Appellants' Opening Br. at 36-39. The appellants read the Constitution to be silent on the power of the President, and the military he commands, to designate, even in the heat of battle, private property as being enemy property subject to destruction outside the protections of the Takings Clause. This silence, in their view, forecloses entirely adopting the government's position that the political question doctrine requires us to abstain from addressing on the merits their contention that the President erred when he deemed the Plant enemy property. Apparently, the appellants' understanding of the Court's political question doctrine demands from the Constitution an *in haec verba* commitment of the issue in order for a nonjusticiable political question to be present.

The appellants' understanding is flawed for several reasons. As an initial matter, we reject the notion that the test of textual commitment requires in this case an explicit statement in the Constitution committing the issue to the President with the level of specificity the appellants demand. As Justice White explained:

> Although *Baker* directs the Court to search for 'a textually demonstrable constitutional commitment' . . . there are

> few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment. . . . The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution. In drawing the inference that the Constitution has committed final interpretive authority to one of the political branches, courts are sometimes aided by textual evidence that the Judiciary was not meant to exercise judicial review—a coordinate inquiry expressed in *Baker*'s 'lack of judicially discoverable and manageable standards' criterion.

Nixon, 506 U.S. at 240-41 (White, J. concurring in the judgment) (citations omitted). Moreover, whatever the Constitution says regarding the President's war powers, either explicitly in its text or by its structure, it need not say anything about the Takings Clause *per se* in order for us to conclude that it commits exclusively to the President the power to make extraterritorial enemy property designations. The Constitution either commits this power to the President or it does not. Whether the putative commitment touches on the Takings Clause in particular is of no moment to the analysis. Indeed, the implications of this power for the purposes of claims made under the Takings Clause are readily apparent from the cases discussed above from which the courts have crafted the enemy property doctrine. Once duly exercised, the power transforms private property into enemy property and precludes recovery of just compensation from the government as a result of its destruction. Finally, and more fundamentally, the appellants' argument on this point ignores what the Supreme Court and our predecessor court, have had to say regarding the President's inherent war powers and the ways in which separation of powers principles require that he share it with the Congress and the federal courts.

We think consideration of the decisional law touching on the nature and scope of the President's war powers sheds important light on our present inquiry under *Baker*'s

"demonstrable textual commitment" test. The Supreme Court has characterized the nature of the President's war powers thusly:

> The Constitution . . . invests the President as Commander in Chief with the *power to wage war* which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

Ex parte Quirin, 317 U.S. at 26 (emphasis added). And where circumstances are such that war is made on the Nation rather than declared by the Congress, the Court has long held that although he may "not initiate the war, [the President] is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) at 668.

In exercising the power to wage war, the President finds authorization in the Constitution itself to "direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Ex parte Quirin*, 317 U.S. at 28. Within these functions are "important incident[s] to the conduct of war" such as "the adoption of measures by the military command . . . to repel and defeat the enemy . . . ." *Id.* They also include "the power to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Id.* at 28-29; *see also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) ("The capture and detention of lawful combatants and the capture, detention and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (citing *Ex parte Quirin*, 317 U.S. at 28)).

In our view, the President's power to wage war must also necessarily include the power to make extraterritorial enemy property designations because such designations are also an

important incident to the conduct of war. As much is borne out of the history of this nation's many declared and undeclared wars, part of which is documented in the cases where courts have applied the enemy property doctrine. The cases teach that the purpose of such designations is almost always to "repel and defeat the enemy" by diminishing the sum of material resources it has at its disposal to prosecute hostilities against the United States and its citizens. Whether the private property destroyed as enemy property is a tank firing rounds at American forces, a bridge the enemy finds necessary to advance to the front, or a commodity, such as oil, imperiled by advancing forces, the aim is the same—to "wage war successfully." *See Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (stating "[t]he war power of the national government is the power to wage war successfully" (internal quotation marks and citation omitted)). We cannot envision how a military commander, much less the Commander-in-Chief, could wage war successfully if he did not have the inherent power to decide what targets, *i.e.*, property, belonged to the enemy and could therefore be destroyed free from takings liability.

Moreover, in one case where the Court of Claims considered the interplay between political question doctrine and the Takings Clause, the court expressly declined to consider a takings claim that arose from military conduct directly traceable to the President's conduct as Commander-in-Chief. As the court recounted in its opinion in *Ingenio Porvenir C. Por A. v. United States*, 70 Ct. Cl. 735, 738 (1930), in 1916, the Navy occupied the Dominican Republic, including its capital Santo Domingo, pursuant to a Presidential proclamation. During the occupation, the provisional government issued a requisition order for the plaintiffs' sugar prohibiting them from selling it on the open market. *Id.* The price of sugar dropped while the requisition order was in effect, and the plaintiffs filed a takings claim against the government seeking just compensation for the loss. *Id.*

The court observed that there were several reasons why it thought the plaintiffs could not recover, but one was certainly dispositive—political question doctrine. *Id.* at 739-40. The court explained that:

> In a general way, the act of taking over the Government of Santo Domingo and all the proceedings thereunder were political matters as to which we have no jurisdiction. Under the Constitution the President is the Commander-in-Chief of the Army and Navy, and this court has no jurisdiction to review his acts in exercising the power so granted in a foreign country and base a judgment thereon. The acts which are claimed to fix a liability on the defendant were done under the orders of the President and occurred in a foreign country. The policy which he adopted and the acts done pursuant thereto were matters of state and wholly within his discretion.

Id. at 739. It concluded that the case was controlled by "principles . . . settled by a long line of decisions, which hold that such cases as . . . [the one that was before the court] . . . present political questions exclusively within the jurisdiction of the Executive Department of the Government." *Id.* We think the conclusion of the Court of Claims, whose precedent we are bound to follow, *see S. Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (*en banc*), applies with even greater force in this case.

Although we conclude, based on our reading of precedent, that those passages of the Constitution that create and define the President's inherent war powers include within their terms the authority to make extraterritorial enemy property designations, our analysis under the first *Baker* test is not at an end. This is so because the entirety of the war powers the Constitution creates are not the President's to exercise alone. They are instead shared with the Congress and the federal courts, especially where an individual's right to own and enjoy property is concerned. *See Hamdi*, 124 S. Ct. at 2650 ("Whatever power the United States Constitution envisions

for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S 579, 644 (1952) (Jackson, J., concurring) (The President "has no monopoly of 'war powers' whatever they are."). As the Supreme Court recently reminded, the President does not enjoy a "blank check" merely because a state of war exists. *Hamdi*, 124 S. Ct. at 2650 (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 587).

With these important separation of powers principles in mind, we conclude nevertheless that the appellants may not seek judicial review of the President's designation of the Plant as enemy property. The appellants' theory of takings liability centers on the alleged inaccuracy of the President's designation of the Plant as enemy property. This must be the case, because as we noted above, if the Plant was in fact the property of al-Qaeda, the appellants would have no claim in takings against the United States for its destruction. In essence then, the appellants are contending that the President failed to assure himself with a sufficient degree of certainty that the Plant was in fact a chemical weapons factory, despite his declaration to the contrary that the information he possessed in 1998 indicated al-Qaeda was using it to manufacture chemical weapons ingredients. The appellants would have the Court of Federal Claims in the first instance, and this court on appeal, provide them with an opportunity to test that contention, and in the process, require this court to elucidate the constitutional standards that are to guide a President when he evaluates the veracity of military intelligence.

We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. In our

view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. Today, we need not decide whether and to what extent the Executive and Legislative branches share that responsibility. We conclude only that the Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations the appellants request in this case.

The circumstances here, under which the Plant was targeted and destroyed, strengthen this conclusion. When the President ordered the Plant destroyed, he exercised the "authority . . . the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Ex parte Quirin*, 317 U.S. at 28. In 1998, the President determined that the Plant's destruction was a necessary and proper response to "the imminent threat of further terrorist attacks against U.S. personnel and facilities." (J.A. at 210.) In his radio address following the strike on the Plant, he maintained that he had "convincing" evidence that the "bin Laden network of radical groups," was responsible for the then recent attacks on United States embassies in Kenya and Tanzania as well as "compelling evidence that the bin Laden network was poised to strike at [the United States] again." President's Radio Address, 2 *Pub. Papers* (Aug. 22, 1998).

Under these conditions, where the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process by which the President assures himself that he has in fact targeted that part of the enemy's wealth of property that he thinks, if it

were destroyed, would most effectively neutralize the possibility of attack. In the *Prize Cases*, the Supreme Court was asked to review the correctness of President Lincoln's determination that a state of war existed between the Union and the secessionist States, and pursuant to that decision, to exercise the right of prize and capture on behalf of the United States over the plaintiffs' ships which had been seized pursuant to an embargo. *The Prize Cases*, 67 U.S. (2 Black) at 666-70. On that question, the Court concluded:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Id. at 670. Likewise, as we indicated above, we think that it is up to the President to determine when he has received "convincing" or "compelling" information sufficient to justify the use of force to destroy private property located outside the territory of the United States belonging to a nonresident alien. Such a determination is, in our view, "a core strategic matter[] of warmaking belong[ing] in the hands of those who are best positioned and most politically accountable for making them." *See Hamdi*, 124 S. Ct. at 2647 (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), and *Youngstown Sheet & Tube Co.*, 343 U.S. at 587).

Moreover, we wonder how a federal court might go about testing the veracity of the intelligence relied upon by the President in deciding to attack the Plant. On this point, the

appellants argue that "the question whether an individual [or his property] is associated with a nation or group hostile to the United States is a question of historical fact which the adversarial system is well-suited to determine." Appellants' Opening Br. at 39. We suspect this characterization belies the complicated and sensitive nature of determining whether private property has in fact been pressed into use by terrorists. More than "questions of historical fact," enemy property designations made pursuant to the President's duty to prevent future terrorist attacks from the country's enemies abroad are often "delicate[] and complex" and can "involve large elements of prophecy" at the time at which they are made. *See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The appellants' desire for judicial review of the President's decision to target the Plant would most surely give way to the specter of field commanders vetting before the civil courts the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with the exigencies of waging war on the battlefield. The Supreme Court has considered what such a state of affairs would mean for the military's ability to wage war and has stated that:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Johnson v. Eisentrager, 339 U.S. 763, 779 (1950). These concerns apply with equal force here, given the appellants' desire to test the veracity of the information upon which the President claims to have relied in ordering the destruction of their property.[6]

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[6] We are aware that these concerns also touch on the coordinate inquiry under *Baker* of a "lack of judicially discoverable and manageable

For all of these reasons, we think the Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the appellants' Plant.

D

The appellants argue further that in the past, courts have looked beyond the President's designation of a takings claimant's property as enemy property, and therefore, the dismissal of their complaint by the Court of Federal Claims on political question grounds is in conflict with precedent. In our view, none of these cases can be read, as the appellants argue they should, to authorize the type of searching inquiry into the accuracy of the President's designation of the Plant as enemy property.

The appellants rely on *Juragua Iron Company*, where the Supreme Court was confronted with a takings claim for the destruction of mining facilities and equipment United States armed forces ascertained were housing "fever germs" that threatened the health of soldiers operating in Cuba during the Spanish-American War. *Juragua Iron Co.*, 212 U.S. at 301-03. The appellants apparently rely on isolated language in the Court's opinion where it stated that the case depended "upon the facts found" by the trial court and in which it concluded that the "circumstances disclosed by the record" demonstrated there was no implied promise by the government to compensate the claimant for its losses. *Id.* at 301, 309.

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standards" for resolving the dispute between the appellants and the government. Although we need not reach this *Baker* criterion, we suspect that even if the concerns expressed in *Eisentrager* did not obtain here, it would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans.

Aside from being directed to a theory of recovery resting on implied contract rather than takings, this language is a slim reed on which we might find what seems to us to be the sweeping authority of the federal courts to review the President's designation of the Plant as the property of al-Qaeda. The *Juragua* court stated that it could be "assumed that the health, efficiency and safety of the troops required that to be done which was done." *Id.* at 302. There is no indication from the Supreme Court's opinion that the claimant disputed the accuracy of the military's determination that its facility did in fact house infectious agents that posed an imminent and immediate threat to the health of its soldiers—a determination analogous to the one President Clinton made here regarding the uses to which the Plant was being put. Consequently, *Juragua* is inapposite because the level of deference owed that determination was never at issue.

Seery v. United States is similarly unavailing to the appellants' case. In *Seery*, the Court of Claims was confronted with a takings claim made by a United States citizen concerning the appropriation by the Army of the claimants' estate in Austria as an officer's club during World War II. *Seery*, 127 F. Supp. at 602-03. The court considered in some detail the status of Austria as an enemy of the United States during the war in order to resolve what it believed was a dispositive issue in the case—whether the estate was located within enemy territory and could, as the government contended, be appropriated by the army with immunity. *Id.* at 603-06. Although the government insisted that Austria had been enemy territory during the war, this assertion contradicted the official position of the State Department. The court explained that:

> If we take at anywhere near face value the numerous expressions of the Executive Department, which is responsible for the conduct of our foreign relations, Austria was, after the surrender of Germany, a nation liberated from a German occupation which had never been

> recognized as lawful by our Government. The property in question, then, was no more subject to uncompensated confiscation than it would have been had it been located in Holland or France or the Philippines.

Id. at 606. The appellant's characterization of *Seery* notwithstanding, the court, in our view, deferred to the government's own official pre-litigation determination that Austria was not an enemy of the United States during World War II. Unlike the instant case, the status of the taken property in *Seery* as enemy property was at odds with the official government policy on the matter. This suggests the government's contradictory assertion during litigation was nothing more than a proffer of counsel, and as a result, it was not worthy of judicial deference. The facts of *Seery* contrast sharply with those of the instant case where explicit statements by the Commander-in-Chief made immediately after the 1998 strikes set forth the official position of the Executive Branch on the question of the enemy status of the Plant.

Finally, we think the appellants' reliance on the *Prize Cases* is at once puzzling and misplaced. The Court's decision in the *Prize Cases* is often cited as authority for judicial deference to the President in the area of war-making. This comes as no surprise since, as we recounted above, the only view the Court expressed on a matter of judicial deference concerned the power of the President to blockade merchant ships engaged in commerce with southern States. On that score, the Court concluded that the declaration of the blockade was itself "official and conclusive evidence" that a state of war existed. *The Prize Cases*, 67 U.S. (2 Black) at 670. The remainder of the Court's exegesis of applicable legal principles concerned the proper definition of the term "enemies' property" in view of the plaintiffs' contention that the property of a citizen or an ally of the United States could not be considered enemy property as a matter of law. *Id.* at 671-74. Nothing in that portion of the Court's opinion states, much less suggests, that the federal courts have any

role in supervising extraterritorial enemy property designations made in the face of imminent attack. Like *Juragua* and *Seery*, the *Prize Cases* do not provide the appellants any basis for disturbing the judgment of the Court of Federal Claims dismissing the complaint.

E

We also do not read the recent decisions in *Hamdi* and *Rasul v. Bush*, 124 S. Ct. 2686 (2004), to counsel a different outcome than the one we reach today. Those cases concerned the detention, away from the front, of citizen and alien enemy combatants captured on the battlefield. Among the issues considered by the Court in both cases was the legality of the President's decision to hold the detainees indefinitely on soil over which the United States exercises, at the very least, plenary and exclusive jurisdiction, without permitting them access to counsel, giving them an opportunity to contest the factual predicates of their detention before a neutral decision maker, or providing them with other forms of procedural due process.

In contrast, here we are faced with what seems to us to be a fundamentally different set of facts giving rise to the appellants' takings claim. Unlike the enemy combatant designations at issue in *Hamdi* and *Rasul*, whose purpose was to invoke the President's power to detain indefinitely captured enemy combatants, the enemy property designation here was made in view of the President's "go/no go" decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States. To be sure, had President Clinton considered the potential takings liability of the United States before making the instant enemy property designation, he may have experienced a moment of pause before ordering the Navy to destroy the Plant. Nevertheless, for the reasons we discuss above, we are loath to add to the President's calculus concerns regarding takings liability when he exercises his power as

Commander-in-Chief to wage war on behalf of the country under the circumstances that obtained in this case.

The appellants credit the President with having formed a good faith belief that the Plant was a chemical weapons factory disguised as a pharmaceutical works, yet they nevertheless question the basis for that belief in an effort to obtain just compensation. We may surmise without deciding that the outcome in this case very well may have been different had there never been any evidence in the record, compelling, convincing, or otherwise, that the President had determined that the property at issue belonged to an enemy of the United States. Faced with a contrary set of facts here, our reading of the Constitution and the Supreme Court's political question doctrine counsels deference to the President's extraterritorial enemy property designation.

In coming to this conclusion, we must emphasize that we express no opinion regarding the President's power, inherent or otherwise, to make enemy property designations over property that is located within the territory of the United States. Here too we might also surmise, without deciding, that the outcome in this case might have been different if the appellants' property were located within the borders of a State rather than in Sudan. In *Youngstown*, Justice Jackson indicated that the constitutional calculus might be different if a domestic, rather than extraterritorial, enemy property designation were at issue:

> That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war

> time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.

Youngstown Sheet & Tube Co., 343 U.S. at 644 (footnote omitted). Today, we need not reach the complex question of the judiciary's role in balancing the interests of the Congress and the President in exercising that aspect of the war powers that includes the power to make domestic enemy property designations. We raise the issue only to emphasize the limited reach of our holding solely to those extraterritorial enemy property designations the President makes in anticipation of imminent attack on American citizens or military forces.

Finally, although it was not raised by the appellants in the proceedings before us, we might consider, *sua sponte*, whether or not the test articulated in *Mathews v. Eldridge*, 424 U.S 319 (1976), requires a different outcome in this case. The *Mathews* test is "[t]he ordinary mechanism that [the Supreme Court] use[s] for balancing [the] serious competing interests [of the government and the individual], and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const., Amdt. 5[.]" *Hamdi*, 124 S. Ct. at 2646. "*Mathews* dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Id.* (citing *Mathews*, 424 U.S. at 335). Here, application of the *Mathews* test would require us to balance the appellants'

strong interest in not being deprived of their property interest in the Plant without due process against the President's interest and capacity to wage war overseas. In other words, we would have to consider whether providing the appellants additional process to contest the single enemy property designation at bar is worth risking the possibility that the panoply of such decisions the President makes in "waging war successfully" overseas will likewise be subjected to review in the federal courts. In short, we think the question answers itself. The balance, in this case, must necessarily tip in the President's favor.

V

For the foregoing reasons, the decision of the Court of Federal Claims to dismiss the complaint because it raises a nonjusticiable political question is affirmed.

AFFIRMED

[Reported at 55 Fed. Cl. 751]

UNITED STATES COURT OF FEDERAL CLAIMS

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 00-443L.

Filed: March 14, 2003.

Stephen J. Brogan, Jones, Day, Reavis & Pogue, Washington, D.C., for Plaintiffs. With him on the briefs were *Timothy J. Finn*, *Jonathan C. Rose*, *Daniel H. Bromberg*, and *Michael S. Fried*, Jones, Day, Reavis & Pogue, of counsel.

Peter H. Oppenheimer, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for Defendant. With him on the briefs were *Thomas L. Sansonetti*, Assistant Attorney General, Department of Justice; Mario Barnes, Department of the Navy; *William Reyes*, Department of Defense; Julian D. Schreibman, Central Intelligence Agency; *George Taft*, State Department; and Sean M. Thorton, Department of the Treasury, of counsel.

OPINION

BASKIR, Judge.

This "takings" case arises out of terrorist attacks against the United States in 1998 and the American military response to these attacks. It comes before the Court on the Government's Motion to Dismiss for lack of jurisdiction and for failure to state a claim. Because we find that the U.S. Constitution's Fifth Amendment "just compensation" clause does not extend to claims arising out of the destruction of a

purported enemy war-making instrumentality through American military action, we GRANT the Defendant's motion and dismiss the Complaint.

BACKGROUND

A. The Precipitating Events

On August 7, 1998, in near simultaneous attacks, the American Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were destroyed by truck bombs. Over 300 people were killed and another 5,000 were injured.

On August 20, 1998, in retaliatory actions by the U.S. military, personally ordered by the President of the United States, Tomahawk cruise missiles were launched against what were said to be terrorist targets in Afghanistan and Sudan. We quote at length first from the President's remarks that afternoon at a school in Martha's Vineyard, Massachusetts. In his remarks, the President identified the enemy as a terrorist group, not a nation-state. The targets were an operational base and a chemical weapons-related facility which posed threats to America's national security. The President gave four reasons which impelled him to act:

> Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the threat they present to our national security.
>
> * * * * * *
>
> The United States launched an attack this morning on one of the most active terrorist bases in the world. It is located in Afghanistan and operated by groups affiliated with Usama bin Ladin, a network not sponsored by any state but as dangerous as any we face. We also struck a chemical weapons-related facility in Sudan. Our target was the terrorists' base of operation and infrastructure. Our objective was to damage their capacity to strike at Americans and other innocent people.
>
> I ordered this action for four reasons: first, because we have convincing evidence these groups played the key

role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.

2 PUBLIC PAPERS OF THE PRESIDENT, WILLIAM J. CLINTON 1460-62 (1998).

The President followed these remarks with a formal statement from the Oval Office later in the day. In it, he described the targets as enemy-related facilities that posed an "imminent threat" to the United States. He described the Sudan target as a factory "associated" with terrorist figure Osama bin Laden (alternatively, "Usama bin Ladin") producing "materials for chemical weapons." We quote from the President's Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan:

Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the imminent threat they presented to our national security.

Our target was terror; our mission was clear: to strike at the network of radical groups affiliated with and funded by Usama bin Ladin...

I decided America must act. And so this morning, based on the unanimous recommendation of my national security team, I ordered our Armed Forces to take action to counter an immediate threat from the bin Ladin network.

Earlier today the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan.

> Our forces also attacked a factory in Sudan associated with the bin Ladin network. The factory was involved in the production of materials for chemical weapons.

Id.

Finally, the President made a formal report to Congress pursuant to the War Powers Resolution on August 21, 1998:

> At approximately 1:30 p.m. eastern daylight time, on August 20, 1998, at my direction, U.S. forces conducted strikes in Afghanistan against a series of camps and installations used by the Usama bin Ladin organization, and in Sudan where the bin Ladin organization has facilities and extensive ties to the government ... United States forces struck a facility in Sudan being used to produce materials for chemical weapons.
>
> * * * * * *
>
> The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected because they served to facilitate directly the efforts of terrorists specifically identified with attacks on U.S. personnel and facilities and posed a continuing threat to U.S. lives.
>
> * * * * * *
>
> I directed these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.

Id. at 1464.

As the succeeding four and a half years have made tragically clear, the attack in Afghanistan failed to kill Osama bin Laden, or to have measurably impaired the operations of his infamous terrorist group, the al-Qaeda. The

attack in Sudan was, however, successful, at least to the extent that the facility was substantially, if not completely, destroyed.

B. The Complaint

On July 27, 2000, the Plaintiffs, El-Shifa Pharmaceutical Industries Company ("the Company" or "El-Shifa") and Mr. Salah El Din Ahmed Mohammed Idris, filed a multi-purpose Complaint in this Court seeking "takings" compensation in the amount of $50 million for the destruction of the Sudan facility. We say multi-purpose because Plaintiffs made the same allegations in an administrative claim for damages before the Central Intelligence Agency, and in a Complaint filed in United States District Court for the District of Columbia (Case No. 1:01-CV-00731), pursuant to the Federal Tort Claims Act. Also, House Resolution (H. Res.) 81 was introduced in the 107th Congress to refer the claim to this Court for a "Congressional Reference" report in support of a private relief bill. The resolution was never acted on.

The Complaint in its entirety alleges essentially the following: Mr. Idris is the principal owner of the El-Shifa company. A native of Sudan, he emigrated to the Kingdom of Saudi Arabia, became a citizen of that nation, and became a highly successful businessman and banker. In March 1998, he purchased shares of El-Shifa Pharmaceutical Company, a corporation organized under the laws of Sudan.

The Company owns and operates the El-Shifa pharmaceutical plant in Khartoum, the capital of Sudan, and is the largest such facility in the country. It produces fifty percent of the pharmaceuticals distributed in Sudan. The plant then and at all times produced consumer pharmaceuticals. As to the allegations of the President that the plant was controlled by terrorists and was producing chemical weapons or their ingredients, the Complaint emphatically denies these charges. It relates what it describes as the Clinton Administration's steady retreat over succeeding days and weeks from the President's original

assertions. It quotes press accounts and remarks attributed to high-level Clinton Administration officials modifying and then retracting allegations of the plant's war-making, chemical weapons nature and its connections to Osama bin Laden or al-Qaeda. For example:

> The *Chicago Tribune* reported on August 28, 1998, "[s]ince the attack, ... the Clinton administration has altered its arguments, sometimes in the face of ambiguous evidence. Officials now admit that the plant produced medicines sold commercially in Sudan. Scientists in the U.S. and Europe maintain that the chemical EMPTA has potential commercial applications as well as being a precursor for VX nerve gas."

Compl. ¶ 74a.

The Complaint also describes Administration efforts to link Mr. Idris to Osama bin Laden, Al-Qaeda and other terrorist groups:

> As justifications for the attack crumbled, U.S. officials began to claim that Mr. Idris was a "partner" with bin Laden, in yet another bad faith attempt at post hoc rationalization for the raid.

Compl. ¶ 75.

> On August 31, 1998, an unnamed U.S. official told the press that the U.S. "suspect[ed]" that Mr. Idris was "involved in money laundering, that he's involved in representing a lot of bin Laden's interests in Sudan."

Compl. ¶ 76.

Mr. Idris unequivocally denied these allegations:

> All of these charges are categorically false. Mr. Idris has never met Usama bin Ladin, he is not a partner with Usama bin Ladin in any business ventures, he has had no dealings with bin Laden, commercial or otherwise, and he is not a financial supporter of bin Ladin or of Islamic Jihad. Mr. Idris maintains a residence and does business in Egypt, which would certainly not be possible if the

> Egyptian government believed he had any ties to the Islamic Jihad (which was responsible for the assassination of Anwar Sadat).

Compl. ¶ 79.

Although the United States blocked some of Mr. Idris' foreign bank accounts according to the Complaint, it lifted the freeze on those accounts rather than defend its action in court.

In addition to this extensive defense of Mr. Idris, the Complaint seeks compensation for what it describes as the "purposeful" destruction without factual basis of a peaceful, that is, non-military factory that produced consumer pharmaceuticals:

> The destruction of the Plant, its fixtures, equipment, and inventory constituted a "taking" of private property for public use within the meaning of the Fifth Amendment to the United States Constitution.

Compl. ¶ 91.

C. The Government's Motions

In response, the Government did not file an answer. Instead, it moved to dismiss the Complaint, initially asserting three independent defects—personal jurisdiction, subject matter jurisdiction, and standing. First, it invoked 28 U.S.C. § 2502(a) (2000). That statute limits a non-citizen litigant's right to sue in this Court, making it contingent upon an equivalent right of judicial access by American citizens in the courts of the Plaintiff's country. Second, the Government asserted that this is a maritime tort claim, over which Federal District Courts have exclusive admiralty jurisdiction, because the missiles had been fired from United States warships operating in international waters. Finally, the Government challenged the Plaintiffs' standing, arguing that the Fifth Amendment's "Takings Clause" does not extend to foreign-owned property located on foreign territory.

After initial briefing and argument, the parties were asked to brief: (1) the justiciability of this dispute under the political question doctrine and, (2) the Takings Clause's application to military action in general and as respects the doctrine of "military necessity," in particular. The parties were also instructed to discuss the application to this case, if any, of *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. 315 (1870), and similar authorities addressing the Takings Clause in a military context.

In the course of this supplemental briefing, the Government appeared to be moving the Court to dismiss on the additional grounds of military necessity, something it had initially declined to do. After the Plaintiffs pointed out procedural irregularities in this attempt, the Court advised the Government that if it wished to make a further motion, it should do so formally. This the Government did, and its further motion was fully briefed, making three rounds of briefing on the motion to dismiss. The Court later conducted a second hearing on these issues. The parties' written and oral advocacy has been uniformly excellent.

The Court is unpersuaded by the initial three theories advanced by the Government, and so it becomes necessary to explore the dimensions of the Fifth Amendment's Takings Clause itself to determine whether it applies in these circumstances. We conclude that the Takings Clause does not extend to claims arising out of military operations against enemy war-making instrumentalities.

DISCUSSION

A. Plaintiffs' Privilege to Sue

Among the Government's initial theories for dismissal is its allegation that the Court lacks personal jurisdiction under RCFC 12(b)(2). Pursuant to 28 U.S.C. § 2502(a), a foreign national may maintain a suit against the United States in the Court of Federal Claims if United States citizens enjoy a reciprocal right to sue the plaintiff's government in one of its courts of law. The foreign plaintiff has the burden of

establishing this reciprocity. *See Pottawatomi Nation in Canada v. United States*, 27 Fed. Cl. 388, 390 (1992); *Aktiebolaget Imo-Industri v. United States*, 101 Ct. Cl. 483, 490 (1944) (under predecessor reciprocity provision). The Defendant argues that El-Shifa has failed to do so.

The Plaintiffs provided a variety of authoritative sources on the law of Sudan. In support of their position that American citizens are able to pursue claims against Sudan, Plaintiffs submitted the statements of experts in Sudanese law. We have also been shown the opinions of persons who have presided in those courts, practiced before them, and studied their decisions. *See* Pls.' Opp'n (Mar. 15, 2001) at App. tabs 2-4 (Decl. of Zaki Abdel Rahman Mohammed Khair; Decl. of El Hussein Ahmed Salih; and Decl. of Ghazi Suleiman). The evidence demonstrates that the Constitution of the Republic of the Sudan guarantees for all persons the right to prosecute claims against the government. This evidence, unchallenged on its own terms by the Government, satisfies the Plaintiffs' prima facie burden.

The Government, for its part, offered no evidence disputing the Plaintiffs' showing of the legal rights afforded Americans. It did not quarrel with the fact that the text of the Sudanese Constitution gave United States citizens the same rights as Sudanese citizens. However, the Government waited until its reply brief—which precluded a rebuttal by Plaintiff—to cite some allegedly contrary constitutional provisions. For the most part the Government made certain conclusory and not otherwise supported assertions in its written papers. We take these to be assertions of counsel only. Further, the Government couched its assessment of Sudanese law in qualifying terms, which betray the equivocal nature of its case. *See* Def.'s Mot. to Dismiss (Jan. 29, 2001) at App. A, Decl. of George Taft, Office of African Affairs, Office of the Legal Advisor, U.S. State Department ¶ 16 (Taft Decl.) ("The status of relations between the governments ..., the unstable security situation within Sudan, and the general subservience of the Sudanese judiciary to the

government *raise serious doubt* whether a U.S. citizen would enjoy the same access to Sudanese courts as Sudanese citizens, and whether a U.S. citizen would be able to *effectively* prosecute a claim in Sudanese courts against the Government of Sudan.") (emphasis added).

The Government's briefs charged that the actual political situation in the Sudan negated any idea that the courts were independent. The papers emphasize that the courts, like all aspects of the Sudanese Government, are subject to Islamic law and are apparently compromised as a consequence. The Government points to Sudan's support of international terrorism and its history of human rights abuses, resulting in tenuous diplomatic relations with the United States, and an official State Department travel advisory restricting travel to Sudan. The Defendant suggests that the Sudanese judiciary has lost its independence and become an instrumentality of discrimination against non-Muslims. In sum, the papers assert that relations between the United States and Sudan are so bad that no American citizen has any realistic hope of obtaining justice in a Sudanese court for a similar claim.

These assertions are deficient. First, the Government proffers no first-hand authority for them at all, neither official nor academic. Its affiant, George Taft, cites unnamed sources for his conclusions:

> I made inquiries by telephone and in person of the Department of State's Office of the Legal Advisor and the Bureau of African Affairs to ascertain whether the Department possesses any relevant documents or other info concerning whether U.S. citizens have a real and effective legal access to the courts of Sudan and Saudi Arabia on the same terms as citizens of those countries, whether citizens of those countries have the right to sue their own governments, and whether U.S. citizens are afforded the same right.

Taft Decl. ¶ 8.

The claims are, as we have said, merely proffers by counsel, albeit these proffers come from a State Department attorney serving as "Of Counsel" on this case. The Defendant has also cited State Department reports indicating that basic civil liberties have been suspended by the Sudanese President in the wake of a declared state of emergency. But the Government carefully avoided the Court's invitation that it produce an official statement from the State Department substantiating the claims made in the briefs.

The implications, of course, are that Sudan's Constitution and the power of its judiciary will not be exercised with vigor. However, the Government has not shown this to be the case. Thus, we find that the Government has not rebutted the Plaintiffs' prima facie case with persuasive evidence.

At bottom, the Government's case consists of an assessment of the political situation within Sudan, and its political relations with the United States. We note that press accounts of United States-Sudanese political relations over these past several months suggest that they are in flux, sometimes improving, sometimes not, and by no means as simple and clear cut as Government counsel states. Diplomatic relations between the United States and Sudan are at least formally in place. In any event, we do not think that Section 2502(a)'s statutory requirement is to be determined by the political assessment of counsel, the Court, or *New York Times* foreign correspondents. The Government has offered no legal authority suggesting that section 2502(a) compliance is to be measured solely by this country's political relations with a foreign government.

As a practical matter, a United States citizen may indeed find it difficult to maintain a civil cause of action against the government of Sudan in its own courts, especially under the current state of affairs. This is certainly a weighty consideration. *See Nippon Hodo Co. v. United States*, 152 Ct. Cl. 190, 193 (1961) ("We would carefully measure the

scope of our jurisdiction in a situation where a rule in a foreign law book permits Americans free access to the courts but where it appears in practice that Americans are barred from the courts."). But the Government can not rebut reciprocity by focusing merely on "how receptive the [Sudanese] courts would have been to a [takings] claim brought by a [United States citizen]." *Pottawatomi*, 27 Fed. Cl. at 392. Nor do the Plaintiffs have to demonstrate that a similar claim brought by an American would likely prevail in Sudan. *Id.*

Our inquiry does not end with either the Defendant's unsubstantiated allegation that strained foreign relations diminish the rights of Americans in the Sudan, or with its more subtle inference that religious fundamentalism destroys those rights. No matter what the alleged political landscape, we are required to look at reciprocity as a legal matter. *See, e.g., Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931) (Russian corporation permitted to pursue takings claim irrespective of lack of official U.S. recognition of Soviet government at that time.); *Zalcmanis v. United States*, 146 Ct. Cl. 254, 256 (1959) (where treaty allowed United States citizens access to Latvian courts, fact that courts were no longer maintained due to the exile of Latvian government did not preclude Latvian claimant's suit in Court of Claims).

The right of a citizen of the United States to prosecute claims in Sudan, even assuming they are impaired by strained diplomatic relations between the two nations, still exists as a legal matter. Based on generally recognized principles of reciprocity, we are compelled to observe that legal right. The Government has produced no official statement to the contrary, nor has it persuaded us through anecdotal evidence or otherwise that access to Sudan's legal system is illusory. The most that the Defendant can contend in good faith is that it is "*highly unlikely* that a U.S. citizen would enjoy the same access to Sudanese courts as Sudanese citizens, *and even more unlikely* that a U.S. citizen could

effectively prosecute a claim in Sudanese courts against the government of Sudan." Def.'s Mot. at 24 (emphasis added).

We conclude by noting that the Defendant has focused entirely on Sudan, the jurisdiction in which El-Shifa is incorporated and its plant located. The Government has conceded there is American access to the courts of Saudi Arabia, the jurisdiction where the individual Plaintiff, Mr. Idris, claims his citizenship. *See* Taft Decl. ¶¶ 8-9. However, it avoids the issue, summarily asserting that the legally cognizable property interests at stake belong solely to the Plaintiff corporation. But the Government has not challenged Mr. Idris' status as a Plaintiff by appropriate motion.

The Government has not rebutted the affirmative case made by the Plaintiffs pursuant to 28 U.S.C. § 2502(a). We reject the Defendant's motion to dismiss on this ground.

B. Admiralty Jurisdiction

Pursuant to Rule 12(b)(1), the Government raises a lack of subject matter jurisdiction in its motion to dismiss, claiming our Tucker Act jurisdiction does not extend to maritime tort claims. At the outset we note that the Government's argument is rhetorically confusing since the Court's Tucker Act jurisdiction, upon which this claim is based, does not extend to tort claims of any sort, maritime or otherwise. *See* 28 U.S.C. § 1491(a)(1) (1994) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress ... in cases not sounding in tort.").

The Defendant's motion raises the question: Just what does determine whether one should be in a court of Admiralty jurisdiction? In one of Patrick O'Brian's famous tales of the sea in the early 19th Century, the question was put to an attorney, and the following discourse ensued:

> "Why, sir," said the lawyer, "if the persecution were tortious, and if it happened at sea, or even on fresh water

> or reasonably damp land, the Admiralty court would no doubt have cognizance."
>
> "Pray, sir," said Stephen, "just how damp would the land have to be?"
>
> "Oh, pretty damp, pretty damp, I believe. The judge's patent gives him power to deal with matters in, upon, or by the sea, or public streams, or freshwater ports, rivers, nooks and places between the ebb and flow of the tide, and upon the shores and banks adjacent—all tolerably humid."

PATRICK O'BRIAN, THE FAR SIDE OF THE WORLD 51 (1984). Reluctant as we are to take this definition from English strangers at sea, the Government's claims for admiralty jurisdiction are equally expansive.

Congress has clarified the reach of maritime jurisdiction, leaving no doubt that it applies even on land in certain instances. Under the Admiralty Jurisdiction Extension Act:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.*

46 U.S.C. App. § 740 (1994) (emphasis added). Defendant claims that because the cruise missiles were fired from U.S. warships in international waters, El-Shifa's tort claim is maritime in nature and falls within the exclusive admiralty jurisdiction of the District Courts, even where the alleged harm occurred on land.

More fundamental than the alleged maritime situs of the injury, is the theory of the claim—tort versus taking. The former belongs in District Court but the latter falls within this Court's expertise even where the taking occurs on the High Seas. *See e.g. Am. Mail Line Ltd. v. United States*, 101 Ct. Cl. 377, 388-89 (1944) (ocean liners requisitioned for evacuation of American citizens adjudicated as takings

claim); *Cent. Gulf Lines, Inc. v. United States*, 209 Ct. Cl. 773, 775 (1976) (considered whether takings or purely maritime contract involved).

The Government's argument rests on the assumption that the Complaint alleges a tort. Indeed, as we have noted with a multitude of excerpts, the Complaint does contain tort-like allegations, especially as it serves to rebut the Administration's justification for the attack. But we also recognize that this "multi-purpose" Complaint, as we termed it, alleges a Fifth Amendment taking. For our purposes, we regard the Complaint's challenges to the Administration's characterizations as Mr. Idris' understandable rebuttals to these attacks on his character and reputation. For the litigation in our Court, we consider them rhetorical "window dressing" to the underlying takings claim.

The Court insisted during the presentation of oral arguments that Plaintiffs disavow any claim of negligence, at least for purposes of this case in this Court. We recognize that Plaintiffs may persist in advancing alternative theories in another forum using similar text from their Complaint. Even so, we have seen counsel slip into the language of tort law in countering the Government's military necessity defense, which we will address shortly. For purposes of the purely jurisdictional motion before us now, however, we hold Plaintiffs to their stipulations. Plaintiff alleges a taking under the Fifth Amendment, not a tort. The Court of Federal Claims, not the District Court, has subject matter jurisdiction over takings.

We thus regard as irrelevant the Government's argument that the Plaintiffs allege a tort that is maritime in nature. But even were we to address the Government's argument on the merits, we would be unpersuaded. It is true that the District Court's admiralty jurisdiction may extend to injuries caused on *terra firma*. But that jurisdiction is, nevertheless, established by a "connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,

513 U.S. 527, 534 (1995). Claims subject to the exclusive admiralty jurisdiction of the district courts are those involving actions that have a "potential disruptive impact on maritime commerce," and have a "substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 534 (quoting *Sisson v. Ruby*, 497 U.S. 358, 364-65 & n.2 (1990)). Tort-takings distinction aside, that connection does not exist here.

In this regard, we take notice of a few facts which put the Government's claim in practical perspective. First, El-Shifa's destruction was brought about not through an inadvertent mishap on the high seas; it was caused very intentionally and deliberately by a weapon known as the Tomahawk *Land* Attack Missile ("TLAM" or "Tomahawk") (emphasis added). Though launched at sea, its intended target here was on land.

According to official data gathered by the Navy at the Plaintiffs' request, the Tomahawk has a maximum effective range of anywhere from 500 miles to 1,000 miles, depending upon the source. The missile, powered by a jet engine, is guided not by the launching vessel on navigable waters, but rather by continual in-flight adjustments, based on Global Positioning Satellite data, as it navigates along a pre-programmed route. The initial flight path is determined from geographical images and terrain features programmed at a remote site, not on the launching vessel, 24-80 hours before the mission. *See* General Accounting Office, *Cruise Missiles: Proven Capability Should Affect Aircraft and Force Structure Requirements* (1995); United States Navy Fact File: Tomahawk Cruise Missile, at http://www.chinfo.navy.mil/navpalib/factfile/missiles/weptoma.html (last modified Nov. 28, 2000). By all accounts, the system is extremely accurate; the likelihood of the weapon missing its intended target is slim. Finally, we note that Khartoum, the city of Chinese Gordon's fame, borders a desert some 400 miles from the nearest international body of water—the

narrow and contained Red Sea, and hundreds of additional miles from the larger Arabian Sea.

We make these points to suggest that the choice of weapon—more accurately, the choice of launch platform for the Tomahawk missile—was apparently a matter of operational decision, dictated by military and political considerations about which we cannot even speculate. But there seems to be nothing essentially maritime about the choice of weapons platform. We asked counsel during argument whether an air-launched cruise missile attack would be subject to maritime jurisdiction if the launching aircraft were all carrier-based, or perhaps partly land and partly carrier-based. Counsel could give no satisfactory answer.

The authorities in this area indicate that the mode of launch is not dispositive. Missile attacks on vessels at sea have implicated maritime jurisdiction when launched from a shore-based installation, *Szyka v. U.S. Sec'y of Defense*, 525 F.2d 62, 64 (2d Cir.1975), or naval aircraft, *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855, 857-58 (9th Cir.1974).

Of course, the fact that the injury occurred on land is also not automatically dispositive, given the explicit terms of the extension of admiralty jurisdiction under 46 U.S.C. App. § 740. Yet that statute does not do away with the need to trace the injury on land back to a maritime activity. The admiralty cases of land-based damages offered by the Government are dissimilar, procedurally and factually, from this case. The closest the Government can offer is the *Grubart* case, in which a shore-based operation caused flooding of a freight tunnel under the Chicago River and subsequent flooding damage to nearby buildings. Because the damage to land-based structures was directly caused by an errant barge in the river, the Supreme Court noted its rejection of a strict situs theory and determined that the claim fell under maritime

jurisdiction. *Grubart*, 513 U.S. at 535-36 (Court looks both at location and maritime connection).

Direct maritime causation and shore-based consequences supported maritime jurisdiction. We have neither here. The destruction of El-Shifa was not directly caused by the naval vessel or even an appurtenance attached to the vessel. *See Grubart*, 513 U.S. at 536. It was caused by a Tomahawk Land Attack Missile that happened to be transported via ship. Moreover, the destruction of a facility in the middle of desert is a far cry from the damage to buildings surrounding the Chicago River.

Neither the mode of attack nor the affected target, alone, establishes the maritime nature of this claim. Whether this uncharted area—the parties have led us to no cases involving a TLAM employed at sea—bears a "substantial relationship to traditional maritime activity" is doubtful. The technology described in the pleadings belies the traditional maritime activity of ship bombardment of shore installation. And so does geography. If we chart the world's land-mass within 1,000 miles range from an international body of water, the reach of America's sea-based military power is awesome. To equate maritime jurisdiction with the reach of present or future missile technology would make much of the world "tolerably humid," indeed. Plaintiff expressed a desire to pursue discovery on the accuracy of TLAM's and the potential for mishap. It is not necessary. The circumstances surrounding this particular attack cannot be said to have had a "potentially disruptive impact on maritime commerce."

Based on the text of the Complaint, and the assumption that Plaintiff alleges a taking and not a tort, we find the traditional interests in protecting maritime commerce which give rise to the district court's exclusive jurisdiction are not at issue. Consequently, we reject this second ground for dismissal offered by the Government.

C. The Fifth Amendment and Foreign-Owned, Foreign-Located Property

Finally, in the last of its initial trio of arguments, the Government asserts the Plaintiffs have no "standing." It claims that the Fifth Amendment does not extend to "takings" of property located outside the United States and owned by non-citizens. The Government is probably correct.

The Takings Clause states simply: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. Amend. V. This provision does not specifically describe the private property to which it applies or the persons it protects. As a general matter the United States is bound by the Constitution when its activities affect citizens outside of our borders. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

It is clear that foreign-owned property located within the United States or its territories, *Russian Volunteer Fleet*, 282 U.S. at 491-92, and foreign property owned by United States citizens, *Seery v. United States*, 130 Ct. Cl. 481 (1955), both fall within the ambit of the Takings Clause. However, it is by no means clear whether property neither located in the United States nor owned by one of its citizens is covered by the Fifth Amendment.

The Supreme Court has addressed the extraterritorial application of the Fifth Amendment in a different context in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). There, aliens imprisoned in Germany following World War II sought *habeas corpus* relief under the Fifth Amendment for their war crimes prosecution by an American Military Commission in China. Although these German nationals were convicted and sentenced under the auspices of the United States, specifically the Secretary of War and various members in the military chain of command, the Supreme Court rejected the proposition that the Constitutional

Amendments granting civil rights generally apply to all the world, including enemies of the United States:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted). We will revisit *Eisentrager* in a later context because the individuals claiming Constitutional protection were enemies, not merely aliens—a factor we find important.

These expansive and unequivocal statements notwithstanding, only a few years later a decision of the Court of Claims appears to have extended another part of the Fifth Amendment to alien claimants seeking just compensation for the taking of foreign property. This case, *Turney v. United States*, 126 Ct. Cl. 202 (1953), is chiefly relied upon by Plaintiffs in countering the Government's lack of standing argument.

In *Turney,* the United States was charged with a Fifth Amendment takings. It had induced the Philippine government to prohibit the export of certain military surplus property that had been donated to the Philippine government by the United States. The property was subsequently sold to a Philippine corporation. The embargo was necessary to permit the United States government to reclaim the property—classified radar equipment—which it eventually did. The Court found that a taking had occurred, and that just compensation was due. It so held despite the fact that both the location of the property and the owner of the property were foreign. *See Turney*, 126 Ct. Cl. at 215. It also concluded—and this point will be significant in later applications of the case—that the United States involvement

in the Philippine government's seizure was sufficiently strong to charge the United States with a taking. *Id.* at 214 ("When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied.").

The Court of Claims did not dedicate much attention to the first proposition. It merely recited precedent that had applied the takings doctrine to alien-owned property located in the United States, and to American-owned property abroad. The Court reasoned that because the Takings Clause could be enforced without inconvenience or practical difficulty, it should apply to foreign-owned, foreign-located property. *See Turney*, 126 Ct. Cl. at 215. The short shrift given to the weighty issue does seem somewhat puzzling, especially given the Supreme Court's clear pronouncement in the then-very recent *Eisentrager* case. *Eisentrager*, 339 U.S. at 784-85.

A few years later, in *Seery v. United States*, the Court of Claims acknowledged this reading of *Turney*, albeit in dictum. 130 Ct. Cl. at 481. Mrs. Seery was an American citizen claiming a taking of her property in Austria after World War II. A house and valuable furnishings had been used and abused by the U.S. Army after the war. The Government objected that the Fifth Amendment did not apply because this property was not located in the United States. The Court rejected that argument:

> We have recently held to the contrary, *Turney v. United States*, 126 Ct. Cl. 202, 215. We recognized that there were no precedents upon the question, but it seemed to us that since the Constitutional provision could be applied, without inconvenience, to such a situation, it ought to be applied. In the *Turney* case, *supra*, the plaintiff was an alien corporation, whereas the instant plaintiff is an American citizen. If that fact is material, it is to her advantage.

Id. at 484.

The United States Court of Appeals for the Federal Circuit more recently cited *Turney* with approval in *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir.1985), *aff'g*, 5 Cl. Ct. 229 (1984), after having recited the facts in that case at length. The Court was not apparently troubled by *Turney's* treatment respecting alien-owned, foreign-sited property. The Court of Appeals quoted the Supreme Court for the test, supplying its own emphasis:

> [I]n any case where government action is causally related to private misconduct which leads to property damage—*a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.*

Langenegger, 756 F.2d at 1570 (quoting *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969)). The Court concluded:

> When considering a possible taking, *the focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists.*

Id. at 1571.

Thus, we may conclude from these cases that there is no simple rule in the Federal Circuit that excludes foreign-owned, foreign-situated property.

However, a strong note of caution must be voiced—two notes, in fact. First, as we recognized in both *Seery* and *Langenegger*, the plaintiffs were American citizens, and so notwithstanding the affirmative references to *Turney*, the cases do not actually endorse that case's expansive extraterritorial reach of the Fifth Amendment.

Second, *Langenegger* presents an instance in which the interference with property rights was directly effectuated by a foreign government, and the issue was whether the United States Government had enough of a role in prompting that action to be charged as the agency of the interference for

Fifth Amendment purposes. The language we have quoted from *Langenegger* must be read as referring to this aspect of *Turney*. In the end, the application of the Takings Clause to the Plaintiffs and their property in our case stands or falls with the precedent of *Turney*.

On a fundamental level, the strength of *Turney* as a precedent for the application of the "takings" clause to foreign-situated, foreign-owned property has been eroded by subsequent Supreme Court decisions. Our colleague, Judge Allegra has analyzed this issue in *Ashkir v. United States*, 46 Fed. Cl. 438 (2000). He concludes that *Turney* no longer has precedential value—an analysis we share—and that it may therefore be disregarded even absent an expression from the Federal Circuit—a conclusion we do not share.

Like *Turney*, *Ashkir* pertains directly to issues raised in our case. In Judge Allegra's case, a Somali national attempted to invoke our Court's takings jurisdiction when his property in Mogadishu was damaged during United States military operations. The property included a large complex of buildings and other facilities that American forces occupied and used as a headquarters in carrying out a humanitarian mission. The Court ruled that the plaintiff lacked standing to raise the claim because neither he nor his property had a "substantial connection" with the United States. *Ashkir*, 46 Fed. Cl. at 444- 45.

In making his ruling, Judge Allegra relied upon recent Supreme Court precedent declining to extend extraterritorially traditional Fourth Amendment Constitutional protections against unreasonable searches and seizures. Primary among these authorities is *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). There a Mexican resident relied upon the Fourth Amendment in seeking to exclude evidence obtained in a warrantless search of his Mexican home by American authorities. The Supreme Court held that the Amendment did not apply under those circumstances. Unlike other cases where we apply

Constitutional protections to foreign nationals, the Mexican subject of the search, "ha[d] no previous significant voluntary connection with the United States." *Id.* at 269.

More to the point, *Verdugo-Urquidez* relied for support on the earlier Supreme Court precedent to which we have previously referred, the *Eisentrager* case, observing that, in that case, the Court had "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* This certainly appears to be the rule where individual due process rights are at stake. For instance, the Court of Appeals for the District of Columbia Circuit recently determined that *habeas* relief is not available to suspected al-Qaeda members detained at the U.S. base in Guantanamo Bay; the Court found that because the base is beyond the territorial jurisdiction of the United States (the base is used pursuant to a lease agreement specifically reserving sovereignty to Cuba) the detainees could not "invoke the jurisdiction of our courts to test the constitutionality or legality of restraints on their liberty." *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). Neither *Verdugo-Urquidez* nor *Eisentrager* comment specifically on the extraterritoriality of the Takings Clause.

Ashkir extends the rationale of those decisions to the takings context. The *Ashkir* case recognized that the "substantial connections" test had rarely been applied in takings jurisprudence. Only one case, *Hoffmann v. United States*, 53 F. Supp. 2d 483, 490-91 (D.D.C. 1999), relied upon this ground for dismissal. The Federal Circuit explicitly endorsed this ruling by the District Court but, ironically, in an unpublished opinion which, by Circuit rules, is non-precedential. *Hoffmann v. United States*, 17 Fed. Appx. 980, 985 (Fed. Cir. 2001); *see also* Fed. Cir. R. 47.6(b) ("An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law.") Judge Allegra reasoned, however, that cases such as *Verdugo-Urquidez* and *Eisentrager* stood for "an

overarching construct of the limited territoriality of the Constitution and, in particular, the Bill of Rights ... [which] is equally applicable to the Takings Clause as any other part of the Constitution." *Ashkir*, 46 Fed. Cl. at 443.

We agree with *Ashkir's* implicit conclusion that the authority of *Turney* has been severely undercut. In fact, the Federal Circuit has at least implicitly recognized that the *Turney* case is somewhat of an aberration as respects its second holding on indirect United States action. *See Casa De Cambio Comdiv S.A., De C.V. v. United States*, 291 F.3d 1356, 1362 (2002) ("In only one case, from our predecessor court, *Turney v. United States* (citation omitted), did we find the government's action towards a third-party to have a direct and substantial enough effect on the plaintiff to require compensation under the Takings Clause.").

However, we are loathe to agree that as trial judges we are not bound to follow a clear precedent because its reasoning is deficient or in apparent conflict with other precedent that can—we must be candid—be distinguished. In our precedent-based, common law structure, trial and intermediate courts are bound to follow decisions on the law articulated by superior courts. This simple rule is subject to many qualifications and elaborations, and we resist the invitation to embark on a law review-sized exposition. Suffice it to say that lower courts have many devices to avoid or evade the inconveniences of a troublesome higher court opinion. The *Ashkir* decision, for instance, appears to have simply avoided the impact of *Turney* by classifying it as a case involving a United States plaintiff; of course, this does not alter the fact that the owner of the taken property, as acknowledged in *Seery*, was, prior to liquidation, a foreign corporation.

We believe that binding decisions must be followed whether they are considered "good law" or "bad law," well reasoned or otherwise. In the event this case is appealed, the Federal Circuit may wish to revisit the *Turney* holding. In

the meantime, mindful of that as-yet officially unrepudiated decision, we part company with Judge Allegra and reject this third ground for the Government's Motion to Dismiss.

D. The Dimensions of the Takings Clause

i. Takings and Military Action

We have entertained and rejected three arguments for dismissal set forth by the Defendant. We grant the Government's motion for another reason: The Constitutional protection afforded by the Takings Clause is not intended to compensate for destruction of enemy war-making property through the exercise of military force. There is no compensation for property "destroyed as a part of the fortunes of war." *Am. Mfrs. Mut. Ins. Co. v. United States*, 197 Ct. Cl. 99, 101 (1972) (no taking occurred where U.S. Army returned fire and sunk naval vessel).

The dimensions of the Fifth Amendment Takings Clause in a military context have been the subject of several court decisions. We conclude from these cases that the clause applies to the civil functions of Government and not to the military. This principle was stated in so many words in the early 19th century case of *Perrin v. United States*, 79 U.S. 315 (1870). Justice Clifford, speaking for the unanimous Court, summarily affirmed the dismissal by the United States Court of Claims. *Id.* That court, predecessor, of course, to our Federal Circuit, and whose decisions are thus binding precedent, discussed the case in more factual and legal detail. We quote the following principle which we believe guides the decision in our case:

> No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals domiciled in the country of its enemy, which its forces may chance to destroy in its operations against such enemy.

Perrin v. United States, 4 Ct. Cl. 543, 547-48 (1868).

The same principle was echoed by the Supreme Court in *United States v. Pac. R.R.*, 120 U.S. 227 (1887):

> The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this.

Id. at 234.

And the Supreme Court quoted there at length the remarks of President Ulysses Grant, an authority on the use of military power if not the law:

> "It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property, caused by actual and necessary military operations, is generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right."

Id. at 238 (citations omitted).

This distinction between compensable civil actions and non-compensable military ones is implicit in the so-called "military necessity doctrine." In these cases, civilian

property destroyed or expropriated because of the exigencies of military action, falls outside the Fifth Amendment. *See United States v. Russell*, 80 U.S. 623, 627-28 (1871). The cases explore where the line is drawn between necessary and unnecessary military destruction or appropriation. *See, e.g., United States v. Caltex, Inc.*, 344 U.S. 149, 150-56 (1952) (military necessity justified Army's destruction of oil terminal facilities after attack on Pearl Harbor in order to prevent use by enemy); *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 113-14 (1907) (destruction of property necessary to prevent spread of disease among troops), *aff'd*, 212 U.S. 297 (1909). Put another way, they police the boundary between the exercise of the military power and the civil, eminent domain power of the state. However that line may be drawn in a particular case, they all, implicitly or explicitly, state that the Takings Clause does not apply to the destruction of property during combat operations.

ii. Takings Jurisprudence and Unauthorized Government Conduct

Before we explore in more detail the tenets of the *Perrin* case, we must return to the Complaint, the President's official statements, and the peculiar principles of takings jurisprudence in this Court.

We recall that the Complaint was founded on the Plaintiffs' contentions that, contrary to the President's assertions, neither the corporation nor the individual Plaintiff was related to terrorism. We quote again for the reader's convenience from the President's first remarks in the early afternoon of August 20, 1998:

> Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the threat they present to our national security.
>
> * * * * * *
>
> The United States launched an attack this morning on one of the most active terrorist bases in the world.... We also struck a chemical weapons-related facility in Sudan. Our

> target was the terrorists' base of operation and infrastructure. Our objective was to damage their capacity to strike at Americans and other innocent people.

2 PUBLIC PAPERS OF THE PRESIDENT, WILLIAM J. CLINTON 1460 (1998).

The President then went on to explain the four reasons why he took this action:

> [F]irst, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.

Id.

The President followed these remarks with a formal statement from the Oval Office later in the day. In it, he described the targets as enemy-related facilities that posed an "imminent threat" to national security. He described the Sudan target as a factory "associated" with bin Laden producing "materials for chemical weapons." We quote again selected portions of the President's Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan:

> Our target was terror; our mission was clear: to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today.
>
> * * * * * *
>
> I decided America must act. And so this morning, based on the unanimous recommendation of my national security team, I ordered our Armed Forces to take action

> to counter an immediate threat from the bin Ladin network.
>
> Earlier today the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan.
>
> * * * * * *
>
> Our forces also attacked a factory in Sudan associated with the bin Ladin network. The factory was involved in the production of materials for chemical weapons.

Id. at 1460-61.

The Complaint does not challenge the President's authority as Commander in Chief to take military actions to defend the Country and its citizens. Rather, the Complaint contradicts the factual premises upon which these justifications rest. For example, paragraph 20 denies that the plant had chemical weapons facilities; paragraph 26 claims that "[t]here was no factual warrant for the destruction of the plant"; paragraph 29 alleges "[n]one of the government's explanations for its actions in destroying the plant has any merit"; and in paragraphs 30 through 81, and in the remaining factual allegations, paragraphs 82 through 89, the Plaintiffs articulate a detailed rebuttal to the official and unofficial Government justifications. Finally, the Complaint explicitly contradicts the President's justification, if not his authority, for the destruction of Plaintiffs' property:

> There is no basis, reasonable or otherwise, for the uncompensated destruction of the Plant either as a chemical weapons facility, as a facility connected to terrorism, or otherwise as a danger to the health and safety of American citizens or allies.

Compl. ¶ 93.

Besides its detailed rebuttal of the official and unofficial justifications, the Complaint makes none-too-subtle an allegation that the attacks were a "Wag the Dog" exercise. The strikes, it is alleged, were ordered to distract America

from a breaking scandal involving the President's affair with a White House intern. Compl. ¶ 29.

It is a cardinal rule of Takings jurisprudence that the legitimacy or authority of the Government's action must be conceded in takings proceedings before this Court. *See Florida Rock Indus. v. United States*, 791 F.2d 893, 898-99 (Fed. Cir.1986), *on remand*, 21 Cl. Ct. 161 (1990); *see generally*, Jed M. Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. ENVTL. L. & POL'Y 359 (2001-02). The place to challenge the authority of the conduct is elsewhere, presumably the District Court in ordinary cases. Although from time to time counsel for the Plaintiffs in the hearings and written papers reasserted the Plaintiffs' factual challenge to the Government's claims of justification, when pressed they admitted, as they must, that for purposes of a takings case, the destruction was authorized, if mistaken.

What is the authority asserted for this action? It is the President's power to defend the Nation by military means against threats of attack by enemy forces; in this case, a threat of attack by chemical weapons from a terrorist group. As our extensive quotation of the President's statements demonstrates, the President took these actions "pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive." 2 PUBLIC PAPERS OF THE PRESIDENT, WILLIAM J. CLINTON 1464 (1998); *see also* U.S. CONST., Art. II., Sec. 2[1]. Thus, for purposes of assessing the Government's motion to dismiss, the question becomes: Does the Fifth Amendment provide compensation for the purposeful destruction of an enemy instrument of war? The question answers itself. And, despite the excellence of the Plaintiffs' advocacy, they have not offered a contrary answer.

In our case, we are not dealing with deliberate or accidental destruction by military means of property

conceded to be private. Such cases fall within the Court's jurisdiction because the Government interference with the private property would presumably be compensable under ordinary circumstances. These are traditional "military necessity" cases. Ours is also not a case of collateral damage to private property from military action. Neither is it an instance where the Armed Forces must seize, occupy or destroy private property in furtherance of a military objective.

Although the Government in its last briefing claims "military necessity," we do not understand it to be conceding that the property was private, nor is it conceding the Court's role to assess the Government's claims of military necessity. Although its language is obscure at several points, we take the Government's claim to be that the President's duty, as Commander in Chief, of securing national self-defense, takes the case out of the eminent domain context. We are dealing with the destruction by military means of asserted enemy property to protect the nation because the President determined this combat operation was necessary.

The property involved is not just enemy property by virtue of its location in hostile territory. *See, e.g., Juragua*, 42 Ct. Cl. at 111-12 (American corporation's property located in Cuba treated as "enemy property"). In our instance, the property is an asserted enemy weapons factory. Our case might just as well involve the destruction by military force of a tank factory, or of a tank, itself. Reduced to its essentials, the President targeted an enemy military facility. The Plaintiffs' challenge that targeting decision as erroneous.

But in opposing what they argue is the "Government's sweeping expansion of the military necessity doctrine"—an issue we do not have to reach—Plaintiffs' counsel makes some key admissions on the appropriate scope of the Takings Clause, in general. We quote at length from the Plaintiffs' papers:

> [B]ecause enemy property is subject to confiscation, the Takings Clause does not apply to attacks on enemy property, and it would therefore be inapplicable to any property destroyed within areas under the control of the Taliban. For the same reason, no takings claim could arise out of the destruction of property in any country that *actually* belongs to an enemy of the United States, such as Usama bin Ladin or Al Qaeda ... *Finally, no matter who owns property that is illegal (such as chemical weaponry), the destruction of such property does not implicate the Takings Clause because such property is subject to government confiscation and destruction.*

Pls.' Opp'n to Def.'s Mot. to Dismiss Based on the Doctrines of Military Necessity and Public Necessity (Pls. Opp. Mil. Nec.) at 25-26 (emphasis added) (citations omitted).

While we may quibble with the Plaintiffs' phraseology, we agree with their restatement of the law. Their entire case rests on their use of the word "actually" and its implications. Thus, the Plaintiffs follow this statement of the law with a description of their case and why it falls outside their restatement:

> In short, this case represents an unusual, if not *sui generis*, situation, in which private property owned by a person who is not an enemy of the United States in a country at peace with the United States is purposefully destroyed in a military operation.

Pls. Opp. Mil. Nec. at 26.

This is demonstrably incorrect as a statement of the law. A number of cases—*Perrin* among them—have considered the enemy status of property when the owner was presumably not an actual enemy. *See, e.g.*, *"The Prize Cases,"* 67 U.S. 635 (1862); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 195-97 (1815); *Seery*, 130 Ct. Cl. at 487. In these cases, the "enemy" nature of the property was its situs in what was, or was not, enemy territory or, for blockade purposes, its port of origin. Therein is the nub of

the issue. For once we recognize that the challenged Government action is an exercise of military power, not civil eminent domain, the matter falls outside the Fifth Amendment and beyond this Court's jurisdiction. As the Supreme Court has recognized, the Takings Clause "is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war." *Caltex*, 344 U.S. at 156 (destruction of plaintiff's petroleum facilities was necessary to deprive enemy of a strategic logistic weapon).

Challenges to the exercise of the President's authority to use military force in defending the country must lie in some other forum than this. On a motion to dismiss, we assume as true the allegations contained within Plaintiffs' Complaint. But if we do so here, the Plaintiffs' Complaint is self-defeating. First, the allegations strip the Complaint of the threshold requirements for a valid takings cause of action. Second, even if we were to assume jurisdiction, the allegations set up a nonjusticiable debate on the propriety of the President's use of force for national security. When the Court pressed the parties for briefing on the political question doctrine, Plaintiff claimed that it did not apply to the questions before the Court: "Because takings claims simply seek just compensation and do not challenge the validity of government conduct, they raise quintessentially judicial questions." Pls.' Suppl. Mem. of Law Addressing the Political Question Doctrine at 3. But we can not reconcile this accurate statement of the law with the allegations within the Complaint.

The Government goes a little further. It supplies the following reasons why the Plaintiffs must accept as true the official justification offered by the President. First, the Court must accept the President's statements as true because to dispute them involves a political question beyond the competence of the Court. Second, El-Shifa challenges "the fact-finding, reasoning, motives and judgment behind the President's order," a challenge not permitted in "takings

litigation." Reply Mem. in Supp. of Def.'s Mot. to Dismiss Based on the Political Question Doctrine and the Doctrine of Necessity at 8. Third, the President's decision was based on his discretionary authority as Commander in Chief, and the exercise of executive discretion is not subject to judicial second-guessing, absent abuse. Fourth, because the United States challenges the jurisdictional assertions of the Plaintiffs, the Court need not accept as true the Plaintiffs' factual allegations. In this instance, however, the Court must accept as true the President's factual findings that underlie his action.

While the Government may well be correct on any or all of these points, a simpler answer lies in what we have already said. Questioning the authority for the action admittedly lies outside the Fifth Amendment and thus this Court's jurisdiction. In any context, even a tort action, the Plaintiffs face obstacles in a challenge to the exercise of discretionary authority, especially in a military operational context. *See Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir.1998) ("discretionary function exception" of Federal Tort Claims Act jurisdictional); *see also Johnson v. United States*, 170 F.2d 767, 770 (9th Cir.1948) (addressing "combatant activities exception" to Federal Tort Claims Act). But it is simply not cognizable in this Court. Whether any court can consider the Plaintiffs' challenge, we leave for resolution in the District Court case.

iii. The *Perrin* Case

We now turn to a closer examination of the *Perrin* case, an early case that distinguishes between the civil power of eminent domain comprehended by the Fifth Amendment, and the exercise of military power which falls outside it. Allowing for the differences of scale from 150 years of history, the facts and circumstances of this case are strikingly similar to our own.

Although the Supreme Court opinion is succinct and relatively barren, we get a full explanation of the factual

setting of the case from the U.S. Court of Claims opinion and even more from President Pierce's Message to Congress of December 4, 1854, relied upon by the Court to state the doctrine we must now follow. The latter is attached as an Appendix to this decision for the history buff.

The case was brought by Marie Louise Perrin, who in 1854 was a French citizen, but who had become a naturalized American citizen by the time suit was filed. Early in 1854, she and her husband had shipped valuable merchandise to the town of San Juan, Nicaragua, also known as Greytown. There it was warehoused. On July 13, 1854, by order of the President of the United States, the town was bombarded by a United States naval vessel, the man-of-war Cyane, under Commander Hollins, and all the plaintiff's goods were destroyed with the rest of the town.

Greytown was a transit point for overland travel between the Atlantic and Pacific. With the cession of California to the United States and the discovery of gold, "the passage across Central America had become of great importance to the U.S." *Perrin*, 4 Ct. Cl. at 546. It was not, however, a safe passage: "Greytown had become the resort of desperate and reckless adventurers, who took pleasure in despoiling the citizens of the United States and insulting her flag and authority." *Id.*

The United States initially insisted that Nicaragua pacify the town, a demand clearly beyond the reach of that government. The President then dispatched the Cyane to the scene. Commander Hollins demanded reparations and apologies, which were not forthcoming. After giving neutrals an opportunity to remove their property, a dispensation the Perrins failed to avail themselves of, he opened fire. The opinion relates the consequences in matter-of-fact terms:

> A large portion of the place was battered down by the guns of the ship, and then a party was sent on shore to apply the torch, and complete by burning what had

> escaped the bombardment. The town was totally destroyed.

Id. at 547.

Commander Hollins made a full report to the Secretary of Navy and the President, who reported to the Congress, and the Commander was commended "for the prompt and efficient manner in which he had carried out the instructions of his government." *Id.*

Like our Plaintiffs, Mrs. Perrin's resort to the U.S. Court of Claims followed her unsuccessful appeals to other forums, in her case the French government, Congress, and the Executive Branch. And, like our Plaintiffs, she based her claim on a takings theory: Because of the clause of the Constitution of the United States which provides that "private property shall not be taken for public use except on just compensation." *Id.* at 544.

We quote again the conclusion of the Court:

> No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals domiciled in the country of its enemy, which its forces may chance to destroy in its operations against such enemy.

Id. at 547-48.

The Court recognized that Mrs. Perrin's claim, like that here, was founded on a challenge to the legitimacy of the government's action:

> The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations. And hinging upon that, it will be readily seen that the questions raised are such as can only be determined between the United States and the governments whose citizens it is alleged have been injured

> by the injurious acts of this government. They are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide.

Id. at 547.

The concluding rationale of the *Perrin* decision, however, takes us in another direction. It is that citizens, Americans or others, with property in foreign countries are left to recourse against that foreign government for any injuries to their property caused by the "belligerent acts committed against that place by another foreign nation," even if the belligerent acts are committed by the United States, notwithstanding the Fifth Amendment. *See id.* at 548-49 (adopting the statements of Secretary of State Seward and Lord Palmerston regarding the responsibilities stemming from the attack of Greytown).

What are we to make of the *Perrin* case? It offers a number of conclusions pertinent to our circumstances:

- The military action was not directed at the state of Nicaragua, with whom we presumably were at peace, but at individuals, not officially associated with a governmental entity, taking concerted action against our citizens and property.

- Hostilities, if not warfare, existed as a consequence of the attacks on United States citizens and property; the situation "called for prompt and decided action on the part of the United States." *Id.* at 546.

- The resulting use of force—destroying the town by shelling and torching the entire town—was directed purposefully at what was regarded as enemy property.

- Some of the "enemy" property destroyed was allegedly private property owned not by any enemy, but by an innocent party.

- The claimant, although at time of suit an American, was at the time of her injury a French citizen—she had applied

unsuccessfully to that government to intercede for compensation with the United States. Citizen or not, she had no recourse in this American court.

• As an American, she bore the misfortunes of war in a foreign place, even when her own government was the cause.

• Claims for injuries for violations of international law are political questions to be decided between governments.

• In sum, notwithstanding her American citizenship or the location of her property, Mrs. Perrin bore the consequences of deliberate military action purposefully committed against that property.

Thus, the *Perrin* case, never overruled, qualified, or distinguished, would seem to end the matter. And we think it does, with one minor but exceedingly troublesome caveat. Is the Plaintiff barred from challenging in Court the President's designation of the property as an enemy weapons facility? And perhaps even more important to the individual plaintiff, Mr. Idris, can he challenge in this Court the President's implicit public designation of him as an accomplice of Osama bin Laden. While not by any means minimizing the significance of the $50 million claim for the destroyed factory, Mr. Idris may understandably value his reputation even more.

iv. Enemy Property

Earlier we alluded to the importance of a precedent such as *Eisentrager* in this case. That case stands for the obvious proposition that an enemy at war with our country may not seek the protections of our Constitution. We recognize that the case has been interpreted even more broadly as precluding Constitutional rights to aliens outside our sovereign territory, regardless of whether they are enemy aliens. *See Al Odah*, 321 F.3d at 1145; *Hoffmann*, 53 F. Supp. 2d at 490. However, we do not have to extend the principle that far.

The case for the air strike against El-Shifa has been played out in the court of public opinion. Commentators have reflected on the President's legal basis for the attack and the intelligence community's role in supporting the decision. *See* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559 (1999) for a comprehensive review of the evidentiary basis for the air strikes against El-Shifa and the terrorist targets in Afghanistan. Still other commentators have speculated that the purported reasons for the attack were not the real reasons—the "Wag The Dog" theory which has even made its way into this Complaint. Those controversies are beyond the scope of the issues that we can review. *See Langenegger*, 756 F.2d at 1569 ("If the 'purported' reasons for action are not the real reasons, we think the matter is not one the judicial bench can correct; a subjective determination of a government's motive is beyond judicial inquiry.") Our inquiry here is limited to the legal consequences of the President's justifications for attack, not the factual underpinning for his justification.

The Plaintiffs do not dispute the consequences for Fifth Amendment compensation of designating property as "enemy property." But they can point to precedent in which the courts have reviewed these Government claims, sometimes rejecting them. The "military necessity" cases are one obvious example. Some of those cases went to trial on disputed facts. Indeed, some cases involved disputes over the "enemy property" designation. *See, e.g., Young v. United States*, 97 U.S. 39, 60 (1877); *"The Prize Cases,"* 67 U.S. at 635 (1862); *Thirty Hogsheads of Sugar*, 13 U.S. at 195-97; *Juragua*, 42 Ct. Cl. at 111-12; *Seery*, 130 Ct. Cl. at 484. In *Seery*, the Court rejected outright the Government's claim, finding that Austria was not "enemy territory" following the surrender of Germany. 130 Ct. Cl. at 487-88. These cases seem to hold that while giving great deference to the Government's claim that the property falls outside the Fifth Amendment, the judicial deference was not total.

We conclude, however, that our case is different. As we have repeatedly noted, the property here was not private property destroyed in the course of military activity, or even private property transformed into enemy property by virtue of its physical location or the allegiance of its owners. The property was designated by the Commander in Chief as enemy war-making property—what we can term "public enemy" property. Based upon intelligence and advice from his national security advisors—faulty or not, we have neither the means nor the authority to determine—the President categorized El-Shifa as an imminent threat to our national security. 2 PUBLIC PAPERS OF THE PRESIDENT, WILLIAM J. CLINTON 1460-62 (1998). With their citation of what they describe as instances of official back-pedaling, Plaintiffs have gone a long way in demonstrating that the designation of El-Shifa as a chemical weapons plant associated with terrorism may have been tragically inaccurate. But notwithstanding the aftermath of the President's decision, for purposes of this lawsuit, we must defer to the President's designation.

A second essential difference is that the action allegedly constituting a taking was the direct application of military force against a military target or, more accurately, a civilian target that was transformed into a lawful military target by the war-making activities of the President. The fact that Sudan, as a nation state, was not at war with the United States is not determinative of the issue. Terrorism crosses national borders, even our own. If that was not clear in 1998 after a number of terrorist incidents directed at American citizens, it is certainly abundantly clear now. Federal courts in three Circuits have just recently handed down decisions, as judges continue to grapple with the legal status and available rights of individuals detained as suspects in the War on Terror. *See Al Odah*, 321 F.3d 1134; *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y.2002), *adh'd to on reconsideration, sub nom., Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y.2003);

and *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003). However, it is agreed that "a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict—particularly when, as on September 11, the United States is attacked." *Padilla*, 233 F. Supp. 2d at 589. In justifying the strike against El-Shifa and the other target in Afghanistan, President Clinton declared: "Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens." Address to the Nation, 2 PUBLIC PAPERS OF THE PRESIDENT, WILLIAM J. CLINTON 1461 (1998).

The *Prize Cases*, 67 U.S. 635, (1862), recognize that the President's declaration of a blockade—of the Confederate ports—is an act of war which is conclusive of the question of whether a state of war exists, whether or not war is formally declared by Congress. *Id.* at 668. The court saw no difference between the nature of that war—between nations, or between a nation and insurgents. Similarly, we are not bound by formality here. *See United States v. Rockwood*, 48 M.J. 501, 508 n.14 (Army Ct. Crim. App. 1998) ("when courts have decided whether 'time of war' exists for various purposes, they have generally looked to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches.") (citations omitted).

And we do not regard a war against a non-state, non-insurgent group—stateless terrorists—to be any less a war. *See, generally,* Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror,"* 4 SCHOLAR 209, 209-225 (2002). Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings—the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon,

the World Trade Center, and in Pennsylvania—are sufficient to confirm the President's assertion that a state of war exists between the United States and those same terrorists determined to have been operating a weapons-related factory in Khartoum. *See id.* at 240 n.183.

This is not a new proposition—military action against the Greytown's quasi-political enemy and President Jefferson's military force against the Barbary Pirates on the shores of Tripoli are other historical examples of military force against loosely organized non-state enemies. And it follows that as the President as Commander in Chief can conclusively designate by his actions a state of war, so he can also designate as Commander in Chief the identity of the enemy targets for the purposes of applying military force or engaging in combat activities. As one commentator has correctly observed: "Since the al-Qaeda fighters belong to a terrorist organization and are not recognized members of an armed force they are unlawful belligerents under the law of war. This means they are responsible for breaches of the law of war but are not entitled to Prisoner of War Status." *See id.* at 239 (footnotes omitted); *see also Padilla*, 233 F. Supp. 2d at 592-94 (Court discusses legal consequences of President designating plaintiff an "enemy combatant.").

v. Deference and the President's War Powers

Our view that the Court is bound by the President's designation of the El-Shifa plant as a chemical weapons facility under the control of Osama bin Laden is not based solely on 19th century cases. Recently the United States Court of Appeals for the Fourth Circuit held the same in an analogous, and even more troublesome case, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003) (*Hamdi III*). That Court upheld an official designation that Mr. Hamdi, an American detained in relation to the most recent terrorist attacks of September 11, 2001, was an "enemy combatant." The declaration was made by a "Special Advisor to the Under Secretary of Defense for Policy." The court expressly

prohibited the trial court from looking behind that declaration.

At stake was a *habeas corpus* challenge to Mr. Hamdi's military detention and denial of other basic due process rights of his American citizenship, rights which might generally be acknowledged as more fundamental than compensation for lost property. And the declaration was by a Special Advisor to a sub-Cabinet office, not the official, formal statement of the President, as in our case.

In this third appeal in the *Hamdi* litigation, the Court described the issue and its resolution as follows:

> The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

Id. at 459.

Mr. Hamdi's petition for a writ acknowledged only that he was seized in Afghanistan by the Northern Alliance and transferred to United States custody. *Id.* at 460. The petition does not concede that Mr. Hamdi bore arms against the Northern Alliance or the United States, or that he was a member of al-Qaeda. Among other forms of relief, he sought an evidentiary hearing to resolve any facts disputed by the Government. *Id.* Thus, in this respect the Hamdi proceedings and our own are similar. Both parties seek to put the United States to proof of its allegation of the parties' enemy status.

In a prior review, the Court of Appeals directed the trial court to conduct a limited and deferential inquiry into whether Mr. Hamdi was indeed an enemy combatant. *See Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir.2002) (*Hamdi II*). On further appeal, the Court of Appeals was loathe to treat precipitously the "complex and serious national security issues" on the one hand, or on the other, quoting its earlier ruling, "to embrace the sweeping proposition in that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi III*, 316 F.3d at 460-61 (citation omitted).

The trial court held the required hearing, expressing its concern with a "war" of such an indefinite character against an enemy of such uncertain and open-ended description. *See id.* Ordered to respond to the petition, the Government moved to dismiss and submitted an affidavit of the Special Advisor admitting all the allegations of the petition, including the fact that Mr. Hamdi had been designated an "enemy combatant." The affidavit also asserted the facts and circumstance that led to the conclusion that Mr. Hamdi was an enemy combatant. *Id.*

The trial court, however, questioned the sufficiency of the affidavit, its candor and completeness, and the standing of the affiant. It issued an opinion concluding that the affidavit was insufficient to support the detention. *See id.* at 462. It ordered the Government to turn over a considerable amount of information about Mr. Hamdi and his activities, in effect, discovery of evidence supporting the "enemy" label. This is the equivalent of El-Shifa's demand that the Government substantiate the allegations in the President's statements justifying his decision to destroy the plant. On the Government's request, the Court certified the question of whether the affidavit was sufficient as a matter of law to support judicial review of the "enemy combatant" designation. *Id.*

Reviewing the President's power as Commander in Chief to wage war, the Court of Appeals mentioned at least three particulars of that power—the authority to detain those captured, to deport or detain enemy aliens, and to confiscate or *destroy enemy property*. *Id.* at 463 (emphasis added) (citations omitted).

The court went on to describe the limited and deferential role of courts as respects matters arising under the war powers allocated by the Constitution to Congress and the President. That deference is founded not only on the particular expertise and organizational capacity of the Executive and Legislative Branches, but also on the political responsiveness of the other branches. *Id.* We might say that, in other words, matters relating to exercise of war-making powers are the most fundamental of "political questions." On the other hand, there is no textual role for the judiciary in the war-making function:

> For the judicial branch to trespass upon the exercise of the war-making power would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical.

Id.; *see also Johnson v. Eisentrager*, 339 U.S. at 789 ("[I]t is not the function of the Judiciary to entertain private litigation ... which challenges the legality, wisdom, or the propriety of the Commander in Chief in sending our armed forces abroad or to any particular region."); *Rockwood*, 48 M.J. at 507 ("On matters concerning military operations, courts should defer to the judgments and actions of the president and commanders in the field, at least in the absence of overwhelming facts to the contrary.").

At the same time, the judiciary has an essential role to play in protecting the rights of citizens—and to some extent, non-citizens—even where the war-making power collides with those rights. *Hamdi III*, 316 F.3d at 464-65. Unfortunately, courts are not nearly as vigilant during times of crisis as they are on later reflection. *See generally*

Korematsu v. United States, 323 U.S. 214 (1944) (upheld exclusion of persons of Japanese ancestry from certain areas during World War II emergency action); *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943) (upheld curfews for Japanese-Americans according only intermediate Constitutional scrutiny); *see also* Civil Liberties Act of 1988, 50 U.S.C. app. § 1989a(a) (1994) ("The Congress recognizes that ... a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II ....").

The right to due process and the right to compensation for property takings are, of course, guaranteed in the same Constitutional amendment. Aside from the matter of citizenship, this case and Mr. Hamdi's detention are parallel in this respect—the identification of each with terrorism. In both cases, we are dealing with the core of the President's war-making responsibilities: The designation of an enemy combatant and of an enemy military target "bear the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities." *Hamdi III*, 316 F.3d at 466. We thus conclude that the right to compensation for a taking under the Fifth Amendment does not extend to the destruction of property designated by the President as enemy war-making property, and that the Court may not look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what constitutes an enemy target and his determination to use military force to destroy that target.

CONCLUSION

Mr. Idris, through his Complaint and his counsel in oral argument, has strenuously denied any connection with terrorism. On a personal level, we see no reason not to accept these protestations at face value. However, for the purposes of this litigation at this time, we are compelled to accept the contrary declaration of the President.

The Constitution's guarantee of just compensation for a Government taking of private property was intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be bourne by the public as a whole." *Langenegger*, 756 F.2d at 1570 (quoting *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). That rationale does not apply in these circumstances. No authority has been presented, among the large body of takings precedent during military operations, where the enemy target of military force was able to invoke the Takings Clause. And for good reason. As the Supreme Court has indicated, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Eisentrager*, 339 U.S. at 779, 70 S. Ct. 936.

For the reasons stated above, we GRANT the Defendant's Motion to Dismiss. The Clerk of Court is directed to enter judgment for the Defendant. Each party to bear its own costs.

IT IS SO ORDERED.

[Appendix to Opinion]

A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS

1789 - 1897

Published By Authority of Congress

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[273] * * * *

EXCERPTS FROM SECOND ANNUAL MESSAGE.

WASHINGTON, December 4, 1854

Fellow-Citizens of the Senate and of the House of Representatives:

The past has been an eventful year, and will be hereafter referred to as a marked epoch in the history of the world. While we have been happily preserved from the calamities of war, our domestic prosperity has not been entirely uninterrupted. The crops in portions of the country have been nearly cut off. Disease has prevailed to a greater extent than usual, and the sacrifice of human life through casualties by sea and land is without parallel. But the pestilence has swept by, and restored salubrity invites the absent to their homes and the return of business to its ordinary channels. If the earth has rewarded the labor of the husbandman less bountifully than in preceding seasons, it has left him with abundance for domestic wants and a large surplus for exportation. In the present, therefore, as in the past, we find ample grounds for reverent thankfulness to the God of grace and providence for His protecting care and merciful dealings with us as a people.

Although our attention has been arrested by painful interest in passing events, yet our country feels no more than the slight vibrations of the convulsions which have shaken Europe. As individuals we can not repress sympathy with human suffering nor regret for the causes which produce it; as a nation we are reminded that whatever interrupts the peace or checks the prosperity of any part of Christendom tends more or less to involve our own. The condition of States is not unlike that of individuals; they are mutually dependent upon each other. Amicable relations between them and reciprocal good will are essential for the promotion of whatever is desirable in their moral, social, and political [274] condition. Hence it has been my earnest endeavor to maintain peace and friendly intercourse with all nations.

* * * *

[280] * * * *

As incidental to these questions, I deem it proper to notice an occurrence which happened in Central America near the close of the last session of Congress. So soon as the

necessity was perceived of establishing [281] interoceanic communications across the Isthmus a company was organized, under the authority of the State of Nicaragua, but composed for the most part of citizens of the United States, for the purpose of opening such a transit way by the river San Juan and Lake Nicaragua, which soon became an eligible and much used route in the transportation of our citizens and their property between the Atlantic and Pacific. Meanwhile, and in anticipation of the completion and importance of this transit way, a number of adventurers had taken possession of the old Spanish port at the mouth of the river San Juan in open defiance of the State or States of Central America, which upon their becoming independent had rightfully succeeded to the local sovereignty and jurisdiction of Spain. These adventurers undertook to change the name of the place from San Juan del Norte to Greytown, and though at first pretending to act as the subjects of the fictitious sovereign of the Mosquito Indians, they subsequently repudiated the control of any power whatever, assumed to adopt a distinct political organization, and declared themselves an independent sovereign state. If at some time a faint hope was entertained that they might become a stable and respectable community, that hope soon vanished. They proceeded to assert unfounded claims to civil jurisdiction over Punta Arenas, a position on the opposite side of the river San Juan, which was in possession, under a title wholly independent of them, of citizens of the United States interested in the Nicaragua Transit Company, and which was indispensably necessary to the prosperous operation of that route across the Isthmus. The company resisted their groundless claims, whereupon they proceeded to destroy some of its buildings and attempted violently to dispossess it.

At a later period they organized a strong force for the purpose of demolishing the establishment at Punta Arenas, but this mischievous design was defeated by the interposition of one of our ships of war at that time in the harbor of San

Juan. Subsequently to this, in May last, a body of men from Greytown crossed over to Punta Arenas, arrogating authority to arrest on the charge of murder a captain of one of the steamboats of the Transit Company. Being well aware that the claim to exercise jurisdiction there would be resisted then, as it had been on previous occasions, they went prepared to assert it by force of arms. Our minister to Central America happened to be present on that occasion. Believing that the captain of the steamboat was innocent (for he witnessed the transaction on which the charge was founded), and believing also that the intruding party, having no jurisdiction over the place where they proposed to make the arrest, would encounter desperate resistance if they persisted in their purpose, he interposed, effectually, to prevent violence and bloodshed. The American minister afterwards visited Greytown, and whilst he was there a mob, including certain of the so-called public functionaries of the place surrounded the house in which he was, avowing that they had come to arrest him by order of [282] some person exercising the chief authority. While parleying with them he was wounded by a missile from the crowd. A boat dispatched from the American steamer *Northern Light* to release him from the perilous situation in which he was understood to be was fired into by the town guard and compelled to return. These incidents, together with the known character of the population of Greytown and their excited state, induced just apprehensions that the lives and property of our citizens at Punta Arenas would be in imminent danger after the departure of the steamer, with her passengers, for New York, unless a guard was left for their protection. For this purpose, and in order to insure the safety of passengers and property passing over the route, a temporary force was organized, at considerable expense to the United States, for which provision was made at the last session of Congress.

This pretended community, a heterogeneous assemblage gathered from various countries, and composed for the most

part of blacks and persons of mixed blood, had previously given other indications of mischievous and dangerous propensities. Early in the same month property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there and their pursuers were driven back by its people, who not only protected the wrongdoers and shared the plunder, but treated with rudeness and violence those who sought to recover their property.

Such, in substance, are the facts submitted to my consideration, and proved by trustworthy evidence. I could not doubt that the case demanded the interposition of this Government. Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing over this transit way, should be peremptorily arrested. Whatever it might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states. [283]

Seasonable notice was given to the people of Greytown that this Government required them to repair the injuries they had done to our citizens and to make suitable apology for their insult of our minister, and that a ship of war would be dispatched thither to enforce compliance with these demands. But the notice passed unheeded. Thereupon a commander of the Navy, in charge of the sloop of war *Cyane*, was ordered to repeat the demands and to insist upon a compliance therewith. Finding that neither the populace nor those assuming to have authority over them manifested any disposition to make the required reparation, or even to offer excuse for their conduct, he warned them by a public proclamation that if they did not give satisfaction within a time specified he would bombard the town. By this procedure he afforded them opportunity to provide for their personal safety. To those also who desired to avoid loss of property in the punishment about to be inflicted on the offending town he furnished the means of removing their effects by the boats of his own ship and of a steamer which he procured and tendered to them for that purpose. At length, perceiving no disposition on the part of the town to comply with his requisitions, he appealed to the commander of Her Britannic Majesty's schooner *Bermuda*, who was seen to have intercourse and apparently much influence with the leaders among them, to interpose and persuade them to take some course calculated to save the necessity of resorting to the extreme measure indicated in his proclamation; but that officer, instead of acceding to the request, did nothing more than to protest against the contemplated bombardment. No steps of any sort were taken by the people to give the satisfaction required. No individuals, if any there were, who regarded themselves as not responsible for the misconduct of the community adopted any means to separate themselves from the fate of the guilty. The several charges on which the demands for redress were founded had been publicly known to all for some time, and were again announced to them. They did not deny any of these charges; they offered no

explanation, nothing in extenuation of their conduct, but contumaciously refused to hold any intercourse with the commander of the *Cyane*. By their obstinate silence they seemed rather desirous to provoke chastisement than to escape it. There is ample reason to believe that this conduct of wanton defiance on their part is imputable chiefly to the delusive idea that the American Government would be deterred from punishing them through fear of displeasing a formidable foreign power, which they presumed to think looked with complacency upon their aggressive and insulting deportment toward the United States. The *Cyane* at length fired upon the town. Before much injury had been done the fire was twice suspended in order to afford opportunity for an arrangement, but this was declined. Most of the buildings of the place, of little value generally, were in the sequel destroyed, but, owing to the considerate precautions taken by our naval commander, there was no destruction of life. [284]

When the *Cyane* was ordered to Central America, it was confidently hoped and expected that no occasion would arise for "a resort to violence and destruction of property and loss of life." Instructions to that effect were given to her commander; and no extreme act would have been requisite had not the people themselves, by their extraordinary conduct in the affair, frustrated all the possible mild measures for obtaining satisfaction. A withdrawal from the place, the object of his visit entirely defeated, would under the circumstances in which the commander of the *Cyane* found himself have been absolute abandonment of all claim of our citizens for indemnification and submissive acquiescence in national indignity. It would have encouraged in these lawless men a spirit of insolence and rapine most dangerous to the lives and property of our citizens at Punta Arenas, and probably emboldened them to grasp at the treasures and valuable merchandise continually passing over the Nicaragua route. It certainly would have been most satisfactory to me if the objects of the *Cyane's* mission could have been consummated without any act of

public force, but the arrogant contumacy of the offenders rendered it impossible to avoid the alternative either to break up their establishment or to leave them impressed with the idea that they might persevere with impunity in a career of insolence and plunder.

This transaction has been the subject of complaint on the part of some foreign powers, and has been characterized with more of harshness than of justice. If comparisons were to be instituted, it would ~~not~~ be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastised with much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty.

* * * *

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Under the solemnity of these convictions the blessing of Almighty God is earnestly invoked to attend upon your deliberations and upon all the counsels and acts of the Government, to the end that, with common zeal and common efforts, we may, in humble submission to the divine will, cooperate for the promotion of the supreme good of these United States.

FRANKLIN PIERCE

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5098

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and there-after the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is DENIED.

The mandate of the court will issue on January 4, 2005.

Circuit Judge DYK did not participate in the vote.

FOR THE COURT,
/s/ Jan Horbaly
Clerk

Dated: December 28, 2004
Filed: December 28, 2004

[Recipients of cc's, Docket number and Note regarding Fed. Cir. R. 47.6 omitted for printing in this appendix]

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

EL-SHIFA PHARMACEUTICAL
INDUSTRIES COMPANY

and

SALAH EL DIN AHMED
MOHAMMED IDRIS,

77 Raynham, Norfolk Crescent,
London, England

Plaintiffs,

vs. Civil Action No.:

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT IN CIVIL ACTION
NATURE OF THE ACTION

1. This is a civil action, pursuant to the Takings Clause of the Fifth Amendment and the Tucker Act, 28 U.S.C. § 1491(a), for just compensation and other appropriate relief arising from the destruction by the United States of the El-Shifa pharmaceutical plant ("the Plant"), on or about August 20, 1998. The Plant was a small private pharmaceutical facility located in Khartoum North, Republic of the Sudan ("Sudan"), with valuable fixtures, equipment, and inventory, all of which were destroyed by the United States.

THE PARTIES

2. Plaintiff El-Shifa Pharmaceutical Industries Company ("El-Shifa") is a stock corporation organized under the laws of Sudan. At all relevant times, El-Shifa was the sole and exclusive owner of the Plant, its fixtures, equipment, and inventory.

3. Plaintiff Salah El Din Ahmed Mohammed Idris ("Mr. Idris") is a citizen of Sudan and of the Kingdom of Saudi Arabia and is the principal owner of El-Shifa.

4. Defendant United States of America caused the destruction of the Plant.

JURISDICTION

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491(a).

6. Sudan and Saudi Arabia each accord to citizens of the United States the right to prosecute claims against their respective governments in their courts.

BACKGROUND

7. Sudan is among the world's poorest countries, whose limited resources have been drained by civil war extending over 15 years. The people of Sudan suffer from many deadly diseases, including malaria, hepatitis, meningitis, tuberculosis and bilharzia, as well as malnutrition and starvation in significant segments of the population. The livestock of Sudan, which play an important role in the economy and nutrition of Sudan's nomadic people, are commonly infected by parasites, malaria and other diseases. Sudan has one of the world's lowest rates of medical doctors per general population and one of the most inadequate supplies of basic pharmaceuticals. Consequently, adult life expectancy in Sudan is depressingly low and infant mortality is exceptionally high.

8. Though small by western standards, El-Shifa was the largest pharmaceutical manufacturing company in Sudan, producing over 50% of both the human and veterinary pharmaceuticals distributed in that country. El-Shifa produced an even greater percentage of the antibiotics used to treat malaria, which is the leading cause of death in Sudan.

9. Because it addressed critical public health needs and was one of the few modern facilities of any kind in Sudan, the Plant was an object of public pride and a symbol of hope. Foreign visitors to Sudan were frequently brought to tour the Plant. In the five-year period before the bombing, several

thousand visitors toured the Plant. Every part of the Plant was open to touring visitors.

10. Salah Idris was born and raised in the town of Shendi in Sudan but emigrated to Saudi Arabia, where he became a highly-successful banker and businessman. Mr. Idris became one of the top officers and a member of the Executive Committee of Saudi Arabia's largest commercial bank, the National Commercial Bank of Saudi Arabia.

11. Personally and through the National Commercial Bank of Saudi Arabia, Mr. Idris caused a number of financial investments to be made in his native Sudan that he hoped would provide needed jobs and commercial activity for impoverished Sudanese.

12. In March 1998, Mr. Idris purchased the shares of El-Shifa for approximately $18 million in an arms-length business transaction.

13. El-Shifa's principal business activity was the ownership and operation of the Plant, which consisted of an administrative building, pharmaceutical plant, warehouse, and support facilities.

14. The Plant was a facility dedicated to encapsulating, mixing, blending, and packaging human and veterinary pharmaceuticals and distributing such pharmaceuticals in Sudan and elsewhere. The Plant repackaged pharmaceutical products, which had been imported in bulk quantities, into finished consumer products such as tablets and capsules for ibuprofen, antibiotics, anti-malarial drugs, anti-diarrhea drugs, and infusion medicines. The Plant did not manufacture pharmaceuticals from raw material chemicals and did not have the sophisticated facilities that would be needed to do so.

15. The Plant's main factory had five production lines. These included tablets, syrups, dry suspensions for oral use, creams, and ointments. Also manufactured were capsules for Shifambecine, an El Shifa-trademarked product similar to Refambicin, used for the treatment of tuberculosis.

16. A separate Beta-lactam section within the Plant's main building for the production of antibiotics had two lines, one for capsules and one for dry suspensions for oral use. There was also a self-contained sterile area for the production of sterile injectable liquids.

17. The veterinary factory, located in the original part of the Plant, had four production lines, including powders, large and small sachets, syrups, and sterile injectables.

18. There was also a quality control laboratory, where analysis of raw materials and finished products took place.

19. In addition, the Plant contained a water-purifying unit producing purified water and distilled water for syrups and medicines used for injections.

20. The Plant did not contain any facilities that could have been used to manufacture chemical weapons or any chemical components of chemical weapons.

21. By the time the Plant was destroyed in August 1998, El-Shifa had registered with various regulatory authorities and organizations to market 33 commercial products.

22. El-Shifa had been specifically approved by the United Nations to supply veterinary medicines to Iraq under the U.N.'s "Oil For Food" program.

23. The Plant was the beneficiary of a loan and subject to a corresponding mortgage of $8 million held by Eastern and Southern African Trade and Development Bank ("PTA"). PTA is a development bank for east African countries based in Nairobi, Kenya. As part of PTA's monitoring of the obligation, it continuously sent auditors to the Plant to ensure that it was operating as it was supposed to and that the prospects for repayment were real. These auditors made and kept records in the regular course of the business of PTA. Those records show that the Plant was engaged in the commercial production of pharmaceuticals. The factory's own sales and production records, also made and kept in the

regular course of the business of the Plant, show its solely commercial nature.

24. On or about August 20, 1998, the United States, without warning, purposefully destroyed the Plant, its fixtures, equipment, and inventory in their entirety.

25. According to statements by U.S. officials, the Plant was destroyed by cruise missiles launched by U. S. naval vessels on the high seas. Sudanese authorities claimed that they recovered parts of 18 cruise missiles amidst the Plant's wreckage.

26. There was no factual warrant for the destruction of the Plant. The United States was not at war with Sudan. The Plant was not a chemical weapons facility, was not connected to terrorism, and was not otherwise a danger to public health and safety. The Plant was selected as a target on the basis of limited and inconclusive intelligence, and on the advice of Richard Clarke, who has been called the "White House terrorism czar" and the "Ollie North" of the Clinton Administration.

27. The United States has not kept secret the ostensible reasons for the destruction of the Plant. Secretary of State Madeleine Albright stated on August 21, 1998 that "[t]he information as to what we have will become available in time." In on-the-record and off-the-record briefings, U.S. officials have repeatedly described the information in the U.S. government's possession supporting the justifications offered for the attack, including classified intelligence information. The government's willingness to make use of intelligence information to bolster its case is illustrated by the comments of Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, who told reporters on September 8, 1998 that he would make what he called "the intelligence community" available to respond to press "questions" and would let "the intelligence community" "talk about the intelligence."

28. None of the U.S. government's explanations for its action in destroying the Plant has any merit. Indeed, its ever-changing story and its pattern of backing away from its allegations amidst inconsistent statements are themselves evidence that there was no legitimate factual basis for the destruction of the Plant.

29. The credibility of the government's explanations is further undermined by the timing of the order to bomb the Plant. Only three days before the attack, President Clinton appeared on national television and made certain admissions about his conduct that were personally and politically embarrassing to him and to the First Lady. The negative political reaction to the President's address, coupled with continued intense coverage of the Monica Lewinsky matter, represented a low point in the Clinton presidency. By ordering the U.S. military into action to destroy this claimed threat to the American people, President Clinton and his advisors sought to restore his diminished presidential authority and popularity.

The Government's First Claim: The Plant Was Involved In The Production Of Chemical Weapons

30. The principal justification advanced first for the attack was that the Plant was involved in the production of chemical weapons. Thus, on the day of the attack, August 20, 1998, President Clinton described the El-Shifa pharmaceutical plant in a televised address to the nation as a "chemical weapons-related facility" that was a "terrorists' base of operation and infrastructure."

31. On August 20, 1998, Secretary of State Albright made similar sensational assertions to support the attack on this small, innocuous plant 8,000 miles from U.S. shores. She said: "In Sudan, they are there manufacturing nerve gas which could kill us all."

32. The claims of the President and the Secretary of State were made with reckless disregard for the truth and for the inconclusive intelligence that had been gathered on the Plant.

These false and dramatic claims were made to create a politically-useful belief that the President had destroyed a grave threat to national security through the deployment of America's most sophisticated weaponry.

33. Other U.S. officials made somewhat less dramatic but equally false claims. They stated that the Plant manufactured O-ethylmethyl phosphonothioic acid, or EMPTA, a substance which is not itself a chemical weapon, but which can be used in the production of VX nerve gas.

34. Thus, on August 20, 1998, Secretary of Defense William S. Cohen stated: "We do know that this facility produces the precursors that can result in the production of VX."

35. Samuel R. ("Sandy") Berger, Assistant to the President for National Security Affairs, stated on the day of the attack that "we know with great certainty [that the Plant] produces essentially the penultimate chemical to manufacture VX nerve gas. . . . [There is] no question that it was making this chemical . . . ."

36. The Department of State issued a statement on August 20, 1998 describing the bombing target as a "facility. . . located within a secured chemical plant" and as a "Sudanese Government-controlled facility . . . involved in the production of chemical weapons agents."

37. On August 20, 1998, a "senior intelligence official" stated at a Department of Defense briefing that "[t]he facility also has a secured perimeter and it's patrolled by the Sudanese military."

38. In truth, the Plant was not controlled by the Sudanese government, was not a terrorist base, was not a chemical weapons facility, and was not involved in the production of chemical weapons or of any chemicals that could be used in manufacturing such weapons.

39. Indeed, the Plant did not produce any chemicals whatsoever, as it was equipped only to prepare and package

bulk supplies of pharmaceutical products for medical use. The Plant lacked the fixtures and equipment necessary to permit the manufacture of sophisticated chemicals of any kind.

40. The Plant was not guarded by Sudanese soldiers or protected by any elaborate security measures. Indeed, the level of security at the Plant was lower than at many urban American public schools. The Plant was bordered by a simple six-foot fence. It stood open to the street between a power station and a candy factory in a section of Khartoum that was within a few kilometers of a residential neighborhood which includes the residences of the ambassadors to Sudan from France, Germany, Korea, Russia, India, and Saudi Arabia. Personnel assigned to plant security were unarmed and dressed in regular plant overalls, not in military uniforms.

41. There were no areas in the Plant to which access was restricted, either for visitors or employees. Shop-floor workers were allowed to wander freely throughout the Plant during meal-times and rest-breaks. Visitors were taken to all areas of the Plant's factory. Bobby May, a long-time friend of President Clinton and now a businessman seeking oil and gas investments in Africa, was in Khartoum when the attack took place. He had toured the Plant a few days before the raid with no restrictions on his movement, as the Plant's employees packaged and bottled medicines. According to a report in *The New Yorker* magazine, May "felt sure that the President and his national-security adviser had somehow got it terribly wrong."

42. American and European engineers and consultants who helped build, design, and supply the Plant have stated that it was not a chemical weapons facility. Tom Carnaffin, a British mechanical engineer who served as the Plant's technical manager during its construction from 1992-1996, has said that the Plant "just didn't lend itself to making chemical weapons." He has also said that the Plant mixed

pre-formulated chemicals into medicines and lacked the space to stockpile or manufacture other chemicals. "It wasn't a large plant. Part of it was used to make veterinary medicines and ointments and part for human medicines. There was never anything like [making chemical weapons precursors]. It was a very open situation. Many people from different countries visited the factory. It [making precursors] would have been a very difficult thing to do. That wasn't the intent of the factory at all."

43. An Italian pharmaceutical executive intimately involved with the Plant confirmed that it was not a chemical weapons plant. Dino Romanatti, whose Milan company supplies powders that generic drug-makers form into pills, has said that he was given the run of the Plant in long visits in February and June 1998. He stated that the managers even left him and his staff alone in the factory when they worked late and gave them keys to the main office to make international phone calls. Romanatti stated: "I didn't see any equipment—and there wasn't even the space—for any production of chemicals. . . . The availability of tools in the factory was close to zero. You couldn't get a piece of steel, a screw, a saw. To imagine a plant that makes chemical weapons is absolutely incredible."

44. In addition, Henry R. Jobe, a retired pharmaceutical consultant who helped design the Plant in 1996, as well as other plants in the Middle East, said that the Plant's choice of equipment did not include any of the laboratory equipment needed to make chemical weapons.

45. The claim that the Plant produced EMPTA was abandoned by U.S. officials after it proved unsupportable. Although Assistant Secretary of Defense for Public Affairs Kenneth Bacon stated at a press briefing on September 8, 1998, that "we believe now, as we did at the beginning, that this plant does make EMPTA," his remarks were later "corrected" to read: "this plant had evidence of EMPTA present." An "administration official" told *The Washington*

Post, as reported on August 21, 1999, that statements made the night of the attack claiming knowledge that the Plant produced EMPTA were "inaccurate": "We never had any evidence of that," the official said. "The correct statement, and it has been corrected, was that EMPTA was present at the plant."

46. National Security Advisor Berger has made a similar about-face. On August 20, 1998, Mr. Berger stated that "we know with great certainty [that the Plant] produces essentially the penultimate chemical to manufacture VX nerve gas. . . ." However, in a PBS "Frontline" documentary aired in May, 2000, Berger backed away from earlier claims that the Plant was without question producing a precursor to VX gas: "I don't think that—I think that is not necessarily the case."

The Government's Second Claim: The Plant Produced No Commercial Products

47. At the same time it claimed the Plant produced chemicals for weapons, the U.S. Government also insisted that the Plant was not a legitimate pharmaceutical facility because it produced no commercial products. On August 20, 1998, National Security Advisor Berger described the Plant as a "so-called pharmaceutical plant."

48. On August 23, 1998, National Security Advisor Berger stated brazenly that the Plant "was used to produce a chemical that is used in the manufacture of VX nerve gas and has no other commercial distribution as far as we understand. We have physical evidence of that fact and very, very little doubt of it."

49. Similarly, on August 20, 1998, a "senior intelligence official" asserted at a Department of Defense briefing, "Ostensibly I guess it's supposed to make pharmaceuticals. We have no evidence, have seen no commercial products that are sold out of this facility."

50. Soon, however, U.S. officials were forced to repudiate these allegations because the Plant did produce commercial

pharmaceuticals. In fact, the Plant supplied over half of all human and veterinary pharmaceuticals in Sudan, it had registered 33 commercial products, and it had been specifically approved by the United Nations to supply veterinary medicines.

51. On or about September 4, 1998, Secretary of Defense Cohen reportedly acknowledged that, when the United States launched cruise missiles against the Plant, it was unaware that the Plant made medicine, and that the United States did not learn until several days after the attack on the plant that it made medicine. On September 9, 1998, Assistant Secretary of Defense for Public Affairs Bacon confirmed that the United States did not know until three days after the attack that the plant made medicine.

The Government's Third Claim: EMPTA Was Stored Or Transported At The Plant

52. After the initial justifications for the attack were questioned throughout the world, U.S. officials amended their explanation. U.S. officials announced on August 25, 1998 that the "physical evidence" that EMPTA was produced in the Plant to which they previously referred was nothing more than a soil sample believed to be taken near the Plant in which EMPTA was claimed to have been detected. The U.S. government stated that EMPTA has no commercial applications, that it does not occur naturally in the environment, and that it is not a by-product of any chemical process. Accordingly, the U.S. government claimed that EMPTA must have been stored at the Plant, even if it was not produced at the Plant. Government officials contended that the Plant was, therefore, "associated" with chemical weapons.

53. A "Government official" was quoted in an August 29, 1998 article appearing in *The New York Times* as saying, "you could spin several scenarios" as to why EMPTA was found at the Plant, including suppositions that the chemical was stored or transported there.

54. United States officials believe that the soil sample that they relied upon was taken from the surface soil approximately 60 feet from the Plant more than seven months before the attack by a foreign national cooperating with U.S. intelligence, consistent with a report in *The New York Times* dated October 27, 1999.

55. A senior inspector from the Organization for the Prohibition of Chemical Weapons, an international organization in the Hague responsible for monitoring international compliance with the chemical weapons treaty, stated that EMPTA was unlikely to have been found, unaltered, in the ground, as the U.S. claimed, because EMPTA is highly reactive and, once in the earth, would react with other chemicals and begin to break down. Given EMPTA's reactive nature, the inspector said that it was not credible that EMPTA could be isolated from a sample taken from the soil outside the Plant.

56. EMPTA in soil breaks down quickly into a substance known as EMPA (O-ethylmethyphosphonic acid), which then remains in the soil for years.

57. After the bombing, soil, sludge, debris, and control samples were collected from the site by environmental engineers employed by Dames & Moore, using standard, EPA-approved collection methods. These samples were analyzed by three laboratories in the United Kingdom and the Netherlands, including the Prins Maurits Laboratory which is internationally recognized for its expertise in the analysis of chemical warfare agents. At a level greater than 10 parts per billion, no sample was found to contain EMPTA or its known breakdown product, EMPA. Plaintiff Salah Idris paid for the collection and analysis of these samples.

58. Significantly, there were no signs of EMPTA or EMPA in samples from the soak-away (or septic) tank, even though tests showed the EMPTA did not break down in the soak-away sludge. Thus, the soak-away provided a time capsule of previous activities at the Plant. If EMPTA had

been produced at the Plant, it would have been detected in the soak-away sample.

59. In fact, neither EMPTA nor other chemical weapons precursors were manufactured at, stored at, or transported to the Plant during any of the relevant times.

60. In addition, international chemical weapons experts have challenged the U.S. assertion that EMPTA has no commercial applications. The Organization for the Prohibition of Chemical Weapons ("O.P.C.W.") has stated that EMPTA could be used "in limited quantities for legitimate commercial purposes," citing as examples fungicides and antimicrobial agents. The O.P.C.W. classifies EMPTA as a schedule 2b chemical, *i.e.*, one that can be used to make chemical weapons but a substance that also has commercial uses.

61. EMPTA is chemically similar to several commercially-available pesticides and herbicides, including the familiar suburban lawn weed-killer called "Round-Up." Hank Ellison, a former director of the U.S. Army's chemical and biological warfare programs at Fort Campbell, Kentucky, stated that the chemical structure of EMPTA resembles an agricultural pesticide, fonofos, which is commercially available in Africa.

62. A report or memorandum prepared by the Central Intelligence Agency on or about July 24, 1998 found that the soil sample taken and relied upon by the United States did not provide conclusive evidence of chemical weapon-related activity and suggested that more soil samples should be taken to help determine whether the Plant is involved with chemical weapons.

The Government's Fourth Claim: The Plant's Alleged Financial Ties To Osama bin Laden

63. Initially, the U.S. government insisted that Osama bin Laden had a direct financial interest in the Plant itself. On August 20, 1998, President Clinton said the Plant was "associated with the bin Laden network." On the same date,

Secretary of Defense Cohen stated that bin Laden "had some financial interests in contributing to this particular facility . . . ." On or about August 23, 1998, National Security Advisor Berger reportedly stated that Osama bin Laden was providing key financial help for the Plant.

64. In fact, there has never been any financial connection between the Plant and bin Laden. Osama bin Laden has never had any financial interest in the Plant, which is fully owned by El-Shifa, nor has he had any financial interest in El-Shifa. Osama bin Laden has not contributed in any manner to the Plant, its operations, or its owner.

65. Faced with this reality, a U.S. intelligence official reportedly acknowledged to the press on August 25, 1998 that there is no direct financial relationship between the Plant and bin Laden. On September 2, 1998, Secretary of Defense Cohen reportedly acknowledged that the financial connection between the Plant and bin Laden was at most "indirect."

66. In fact, the United States has found no evidence of even an "indirect" financial connection between El-Shifa and bin Laden. Secretary Cohen's intimation that there may be such an indirect connection was a disingenuous attempt to justify the misstatements he and others had previously advanced.

The Government's Fifth Claim: The Alleged Ownership Interest Of Sudan's Military Industrial Complex

67. Next, the U.S. government tried to claim that although bin Laden did not invest in the Plant directly, he invested in the Military Industrial Complex Corporation ("MIC Corp."), a Sudanese government-controlled company, and that this MIC Corp. held an investment or ownership interest in the Plant. It was reported on August 26, 1998, that administration officials acknowledged that bin Laden had no direct investment in the Plant, but insisted that he had ties to Sudan's state-run military-industrial complex.

68. National Security Advisor Berger stated: "The so-called pharmaceutical plant is part of something in Sudan called the Military Industrial Complex—Dwight Eisenhower must be rolling in his grave. That is not a generic term, it is an enterprise. We know that bin Laden has been a substantial contributor to that enterprise."

69. Statements concerning Sudan's "military industrial complex" were made by government officials to create the false impression that this civilian pharmaceutical plant was actually a military facility and an appropriate military target.

70. In fact, El-Shifa is the 100% owner of the Plant. Sudan's MIC Corp. has never held any ownership interest in the Plant or in El-Shifa. Further, the Plant produced civilian medicines and was never part of anything that could be regarded as Sudan's "military industrial complex."

71. Mr. Idris is not a member or supporter of the political party that controls the government of Sudan and is, in fact, a well-known supporter of a Sudanese political party that opposes the current government of Sudan. Moreover, Mr. Idris regularly writes a thoughtful, dispassionate column in a Cairo-based newspaper critical of the current Sudanese regime.

The Government's Sixth Claim: Allegations About Salah El Din Idris

72. Mr. Idris is the principal owner of El-Shifa. Mr. Idris is a citizen of the Kingdom of Saudi Arabia and a well-respected international businessman who is engaged in a variety of business activities in the Middle East and Europe.

73. When President Clinton announced the attack on August 20, 1998, he made no mention of Mr. Idris. Secretary of Defense Cohen, who stated that the Plant was part of the bin Laden network, similarly did not mention Mr. Idris.

74. Within 10 days of the attack, the justifications offered by the United States had been broadly refuted in the mass media around the world. For instance:

a. The *Chicago Tribune* reported on August 28, 1998, "[s]ince the attack, . . . the Clinton administration has altered its arguments, sometimes in the face of ambiguous evidence. Officials now admit that the plant produced medicines sold commercially in Sudan. Scientists in the U.S. and Europe maintain that the chemical EMPTA has potential commercial applications as well as being a precursor for VX nerve gas."

b. *The New York Times* stated on August 29, 1998 that "some of the key statements made by Administration officials to justify the attack have proven to be inaccurate, misleading or open to question." The officials' "descriptions of the plant as a highly secretive, tightly secured military-industrial site, their initial statement that the plant produced no commercial products, and their statements that the exiled Saudi millionaire, Osama bin Laden, directly financed the plant, do not appear to be factual."

c. *The Economist* reported on August 29, 1998 that "there was a growing consensus among diplomats and journalists in Khartoum that American intelligence had boobed." The author stated that, after spending "more than two hours clambering over—and under—the smoking ruins," he "found nothing to suggest that it was anything but a plant producing medicine for humans and veterinary drugs for animals. There was no sign of the hidden laboratories or storage rooms underground which some had darkly hinted at."

75. As justifications for the attack crumbled, U.S. officials began to claim that Mr. Idris was a "partner" with bin Laden, in yet another bad faith attempt at post hoc rationalization for the raid.

76. On August 31, 1998, an unnamed U.S. official told the press that the U.S. "suspect[ed]" that Mr. Idris was "involved

in money laundering, that he's involved in representing a lot of bin Laden's interests in Sudan."

77. U.S. officials also accused Mr. Idris of being "a front man or agent for bin Laden."

78. Still later, U.S. officials changed their story yet again, claiming that Mr. Idris has ties to Islamic Jihad, which is an Egyptian Islamic organization. On October 4, 1998, *The New York Times* reported that, according to "American intelligence officials," Mr. Idris "has had financial dealings with members of Islamic Jihad, an Egypt-based group responsible for the assassination there of President Anwar el-Sadat in 1981. Islamic Jihad, in turn, receives money and sponsorship from Mr. bin Laden and has been absorbed into his terror network . . . ."

79. All of these charges are categorically false. Mr. Idris has never met Osama bin Laden, he is not a partner with Osama bin Laden in any business ventures, he has had no dealings with bin Laden, commercial or otherwise, and he is not a financial supporter of bin Laden or of Islamic Jihad. Mr. Idris maintains a residence and does business in Egypt, which would certainly not be possible if the Egyptian government believed he had any ties to the Islamic Jihad (which was responsible for the assassination of Anwar Sadat).

80. The U.S. government has previously declined to defend its allegations that Mr. Idris is associated with terrorism. Four days after the strike on the Plant, the U.S. Department of the Treasury, Office of Foreign Assets Control, sent a letter to the Bank of America purporting to block bank accounts held by Mr. Idris in Europe containing some $24 million, on the supposed ground that Mr. Idris was associated with terrorism. In February 1999, Mr. Idris filed suit to unfreeze his accounts. On the day in May 1999 when the government's answer was due to be filed, the Treasury Department issued an order unblocking Mr. Idris' accounts—effectively conceding the litigation.

81. After that lawsuit, the United States ceased to rely publicly on Mr. Idris' alleged connections to terrorists as a rationale for its conduct, though it has not retracted any of its statements regarding Mr. Idris. A State Department spokesman stated on May 7, 1999 that "our actions against the plant were not predicated on the gentleman's [Mr. Idris'] ownership of the plant. I think we indicated at the time we didn't know he was the owner until after the strike."

Post-attack Investigations

82. After the attack, the government of Sudan called for international inspection of the destroyed plant. The U.S. refused to permit an investigation of its actions or of the Plant by the U.N. Security Council or other impartial international authorities.

83. After the attack, U.S. intelligence agencies, including the Central Intelligence Agency, attempted to find information that would confirm the alleged association of the Plant with chemical weapons and the alleged presence of EMPTA. No additional evidence supporting these allegations was discovered.

84. After the attack, the U.S. State Department's Bureau of Intelligence and Research drafted a report that found inadequate the evidence on which the Administration relied to support the attack on the Plant. Thomas R. Pickering, Under Secretary of State for Political Affairs, directed that this report should not be completed and submitted. Mr. Pickering's directions to suppress this report overruled the objections of Assistant Secretary of State Phyllis Oakley, a highly-respected, career State Department officer with responsibility for the Bureau of Intelligence and Research.

85. After the attack, government officials reported that the soil sample on which the United States relied could not be retested because it had all been destroyed in the original testing.

86. Independent investigations conducted after the attack have, however, documented that there was no factual basis for the raid.

87. Patrick Eddington, a former CIA photo analyst, reviewed satellite imagery of the Plant before and after the attack released by the Pentagon and found no evidence whatsoever of military fortifications typical of chemical weapons installations. His conclusion is that the Plant was solely a pharmaceutical facility.

88. Former U.S. Attorney General Ramsey Clark led a fact-finding mission to the Plant in September 1998, interviewing plant employees and U.N. representatives. Clark concluded that the U.S. government's justifications for the attack were wrong and called for the U.S. to make financial restitution.

89. Repeated examinations of the evidence by journalists have found the justifications for the attack that have been offered by the United States to be factually unsupported. For instance:

a. On July 25, 1999, *The Washington Post* reported summarized evidence refuting the government's claims and reported that "[a] growing chorus of critics around the world seemed unconvinced by the administration's 'compelling' evidence . . . ."

b. On October 27, 1999, *The New York Times* stated that "[r]eporters visiting the ruined building saw bottles of medicine but no signs of security precautions and no obvious signs of a chemical weapons manufacturing operation."

c. *The New Republic* concluded in its November 22, 1999 issue that, "[n]ow, more than 14 months later, after repeated investigative reports and repeated evasions by the Clinton administration, it is clear that the missile attack [on the Plant] was a mistake. It's time to say so."

Claim For Relief

90. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs, as though the same were fully set forth at length herein.

91. The destruction of the Plant, its fixtures, equipment, and inventory constituted a "taking" of private property for public use within the meaning of the Fifth Amendment to the United States Constitution.

92. The Plant, its fixtures, equipment, and inventory were "private property" within the meaning of the Fifth Amendment, as they were privately owned by Plaintiffs.

93. There is no basis, reasonable or otherwise, for the uncompensated destruction of the Plant either as a chemical weapons facility, as a facility connected to terrorism, or otherwise as a danger to the health and safety of American citizens or allies.

94. The United States acted pursuant to an order by the President, and the attack on and destruction of the Plant was carried out by authorized actions of officials and agents of the United States.

95. The United States has never been at war with Sudan, and at all relevant times the United States has maintained diplomatic relations with that nation.

96. The United States treats Osama bin Laden not as a foreign belligerent power during wartime, but as a criminal fugitive. He had been criminally indicted in the United States and is on the FBI's list of "ten most wanted criminals."

97. The United States has refused to compensate Plaintiffs in any way for the taking.

98. As a direct result of the taking, Plaintiffs have lost all the benefit of their private property consisting of the Plant, its fixtures, equipment, and inventory and have lost profits and market opportunities from the time of the attack to the present.

99. Accordingly, Plaintiffs are entitled to just compensation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment against the Defendant as follows:

1. Just compensation for the destruction of the El-Shifa pharmaceutical plant in an amount not less than $50 million for the value of the Plant, its fixtures, equipment, inventory, lost profits, market opportunities and interest thereon at the legal rate from August 20, 1998;

2. Attorney's fees, costs, and other expenses for the bringing of this action, pursuant to 42 U.S.C. § 4653(c); and

3. Such other and further relief as this Court deems just and proper.

July 27, 2000

/s/

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(2)

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No. 04-1291

In the Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners sued the United States in the Court of Federal Claims, seeking compensation under the Just Compensation Clause of the Fifth Amendment for the value of a Sudanese manufacturing facility destroyed by the United States military. The question presented is as follows:

Whether an alien may sue under the Just Compensation Clause to recover the value of property located abroad that was determined by the President to be enemy property and was destroyed by United States military personnel pursuant to a Presidential directive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 378 F.3d 1346. The opinion of the Court of Federal Claims (Pet. App. 42a-96a) is reported at 55 Fed. Cl. 751.

JURISDICTION

The court of appeals entered its judgment on August 11, 2004. A petition for rehearing was denied on December 28, 2004 (Pet. App. 97a). The petition for a writ of certiorari was filed on March 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1998, following a coordinated terrorist attack on the United States Embassies in Kenya and Tanzania, President Clinton directed the United States Navy to destroy two targets—a base of operations in Afghanistan and an industrial facility in Sudan—associated with the perpetrators of that attack (Osama bin Laden and al-Qaeda). In a radio address and in a letter to Congress immediately following the military strikes, the President explained that he had determined that the Sudanese facility produced materials for chemical weapons, and that both military operations were intended to disrupt and prevent future attacks and to prevent the acquisition of chemical weapons by terrorist groups. Pet. App. 2a-3a.

Petitioners are the Sudanese corporation that owned the industrial facility and the corporation's sole shareholder, a dual national of Saudi Arabia and Sudan. Petitioners brought this suit approximately two years after the facility was destroyed. Their complaint questioned the correctness of the President's conclusion that the Sudanese facility was a legitimate military target, and it sought $50 million under the Just Compensation Clause of the Fifth Amendment for the United States military's destruction of the property. See Pet. App. 2a-3a, 98a-118a.

2. The Court of Federal Claims (CFC) dismissed petitioners' complaint. Pet. App. 42a-89a. The CFC explained:

> [T]he right to compensation for a taking under the Fifth Amendment does not extend to the destruction of property designated by the President as enemy war-making property, and * * * the Court may not look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what constitutes an enemy target and

> his determination to use military force to destroy that target.

Id. at 88a.

3. The court of appeals affirmed. Pet. App. 1a-41a.

The court of appeals noted petitioners' concession that relief is not available under the Just Compensation Clause when the United States destroys enemy property in the course of military operations. Pet. App. 14a; see *id.* at 31a. Rather than arguing that the destruction of enemy property through military operations is a compensable taking, petitioners "challenge[d] the government's designation of the Plant as enemy property by, *inter alia*, suggesting that the President relied on flawed intelligence in targeting it for destruction." *Id.* at 23a. The court of appeals held that petitioners' claim was not cognizable because the constitutional authority of the Judicial Branch under Article III "does not encompass judicial supervision over the President's designation as enemy property the private property belonging to aliens located outside the territory of the United States." *Id.* at 24a.

In reaching that conclusion, the court of appeals relied on constitutional principles of separation of powers, and specifically on the political question doctrine. Pet. App. 24a-35a. The court concluded that

> the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. * * * [T]he Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures de-

> signed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. * * * [T]he Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations the [petitioners] request in this case.

Id. at 31a-32a. The court expressed particular concern that judicial cognizance of petitioners' claims would create "the specter of field commanders vetting before the civil courts the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with the exigencies of waging war on the battlefield." *Id.* at 34a.

The court of appeals also concluded that this Court's recent decisions in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), do not support petitioners' claim. Pet. App. 38a-41a. The court observed that *Hamdi* and *Rasul* presented questions concerning "the President's decision to hold the detainees indefinitely on soil over which the United States exercises, at the very least, plenary and exclusive jurisdiction." *Id.* at 38a. In the instant case, by contrast, the challenged designation of petitioners' industrial plant as enemy property "was made in view of the President's 'go/no go' decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.[1]

1. Petitioners contend (Pet. 6-8) that the decision below conflicts with this Court's decision in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004). That argument lacks merit.

a. At issue in *Hamdi* was the ongoing and potentially indefinite detention of a United States citizen who was held within the United States. See 124 S. Ct. at 2635-2636, 2641. In defining the procedural safeguards to which Hamdi was entitled, the plurality emphasized "the fundamental nature of a citizen's right to be free from involuntary confinement

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[1] In addition to the reasons stated in the text, this case is a poor vehicle for considering the question presented because the CFC lacked jurisdiction under the Reciprocity Act, 28 U.S.C. 2502. Under that statute, "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the [CFC] if the subject matter of the suit is otherwise within such court's jurisdiction." 28 U.S.C. 2502(a); see *United States* v. *O'Keefe*, 78 U.S. 178 (1870). In the courts below, the government argued that the CFC lacked jurisdiction because the courts of Sudan do not ensure meaningful access by United States citizens seeking to sue the government of that country. The court of appeals rejected that contention, holding that, so long as the courts of Sudan do not discriminate between Sudanese and United States plaintiffs, the requirements of the Reciprocity Act are satisfied, even if both sets of plaintiffs are denied the opportunity to sue the Sudanese government in Sudanese courts. See Pet. App. 12a-13a. That holding is inconsistent with the plain text of the Reciprocity Act. Under the terms of the Act, an alien's right to sue the United States in the CFC depends not on whether the courts of the alien's country of nationality discriminate against United States plaintiffs, but on whether United States citizens are actually afforded "the right to prosecute claims against [the foreign] government in its courts." 28 U.S.C. 2502(a).

by his own government without due process of law." *Id.* at 2647. In the instant case, by contrast, petitioners are foreign nationals who seek retroactive monetary relief for the prior destruction of property located abroad. Nothing in *Hamdi*'s holding or analysis suggests that such a claim is judicially cognizable, much less that a court in such a suit may review and potentially reject the President's determination that a particular facility was enemy property. See Pet. App. 38a.

b. In asserting that the court of appeals' decision in the instant case conflicts with this Court's ruling in *Hamdi*, petitioners principally contend that, "in holding that the President's enemy property designations are unreviewable, the lower court adopted the arguments advanced and rejected in *Hamdi*." Pet. 7. Petitioners' allusion to the "the arguments advanced and rejected in *Hamdi*" refers to contentions based on the President's need as Commander in Chief to conduct military operations without undue judicial interference. See Pet. 7-8. Petitioners' claim of a conflict is misconceived.

The Court in *Hamdi* did not announce a categorical rule that determinations by the President and others in the realm of military affairs are *always* subject to judicial review. To the contrary, the plurality recognized that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." 124 S. Ct. at 2647 (citing *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952)). Indeed, the plurality specifically observed that "initial captures on the battlefield need not receive the process [described in the opinion]; that process is due only when the determination is made to *continue* to hold those who have

been seized." *Id.* at 2649. The military strike for which petitioners seek compensation is far more analogous to an initial battlefield capture than to the continued detention within this country's borders of an alleged enemy combatant.

The plurality opinion in *Hamdi* does make clear that the constitutional and public interest in the President's vigorous conduct of military affairs will not *invariably* outweigh competing constitutional concerns. See 124 S. Ct. at 2648 (concluding that the government's position in that case did not "strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant"). The Federal Circuit's decision in the instant case, however, is in no way inconsistent with the *Hamdi* Court's recognition of certain constitutional constraints in the context of that case. Just as the Court in *Hamdi* did not hold that the President's military decisions are *always* reviewable, the court of appeals here neither held nor suggested that such decisions are *never* subject to judicial scrutiny. Rather than announce a broad, categorical rule, the Federal Circuit was careful to limit its holding to the circumstances of this case. See, *e.g.*, Pet. App. 39a ("[W]e express no opinion regarding the President's power, inherent or otherwise, to make enemy property designations over property that is located within the territory of the United States."); *id.* at 40a ("We * * * emphasize the limited reach of our holding solely to those extraterritorial enemy property designations the President makes in anticipation of imminent attack on American citizens or military forces.").

c. Even apart from the potential interference with military decisionmaking that adjudication of petitioners' takings claim would entail, petitioners have no rights under the Just Compensation Clause because they are non-resi-

dent aliens and the property that is alleged to have been taken was located in a foreign country. This Court "ha[s] rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)); see *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (explaining that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders," and citing *Verdugo-Urquidez* for the rule that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States). No logical basis exists for treating the Just Compensation Clause of the Fifth Amendment as an exception to that general rule. And petitioners' reliance on the Due Process Clause analysis in *Hamdi* is especially unavailing in light of their own inability to invoke Due Process Clause protections.

2. There is likewise no merit to petitioners' contention (Pet. 9-10) that the decision of the court of appeals conflicts with prior decisions that have addressed takings claims arising from the conduct of military operations. Most of the decisions on which petitioners rely held that the plaintiffs were *not* entitled to compensation for property destroyed in the course of United States military operations. See *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 89-94 (1969); *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 152-156 (1952); *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 303-311 (1909); *American Mfrs. Mut. Ins. Co.* v. *United States*, 453 F.2d 1380, 1381 (Ct. Cl. 1972). Two of the cases cited by petitioners—*Wiggins* v. *United States*, 3 Ct. Cl. 412, 421-424 (1867), and *Grant* v. *United States*, 1 Ct. Cl. 41, 50 (1863)—in which the Court of Claims awarded compensation for property destroyed during wartime oper-

ations, are no longer good law, since their analysis is inconsistent with this Court's subsequent decision in *Caltex*. See 344 U.S. at 152-156. And *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985), did not involve a just compensation claim at all, see 745 F.2d at 1505, 1510-1511, and the injunctive relief sought in that case was denied on remand from this Court, see *De Arellano* v. *Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986).

Petitioners' claim of a conflict is principally based on the fact that the court of appeals in the instant case invoked the political question doctrine, while courts in other cases have considered on the merits (and typically rejected) takings claims involving the conduct of military operations. See Pet. 9.[2] In holding that petitioners' own claims were barred by the political question doctrine, however, the Federal Circuit did not announce a blanket rule that military action can never give rise to a justiciable takings suit. To the contrary, the court stated that "the government does not avoid the Takings Clause by simply using its military forces as cover for activities that would otherwise be actionable if performed by one of its civilian agencies. Military conduct

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[2] Indeed, petitioners concede that a takings claim cannot be based on the destruction of enemy property, or the destruction of property to prevent its use by the enemy. See Pet. 11 (citing, *inter alia*, *Juragua* and *Caltex*). They contend that the President made an error in concluding that their plant in Sudan was associated with and would be used by al-Qaeda in support of future attacks. A claim based on destruction of property in these circumstances sounds in tort, seeking to hold the United States liable in negligence, or even strict liability, for injuries arising from the allegedly erroneous judgment by the President as Commander in Chief. See *Schillinger* v. *United States*, 155 U.S. 163, 168, 169-170 (1894); but cf. Pet. App. 9a-11a. The Federal Tort Claims Act would not allow recovery on such a claim. See, *e.g.*, 28 U.S.C. 2680(a), (j), and (k).

that does not touch on the destruction or appropriation of enemy property can sometimes give rise to a valid takings claim." Pet. App. 14a. Rather than adopting a broad rule of non-justiciability applicable to military affairs generally, the court held only that the President's designation of particular overseas installations as "enemy property" was not subject to judicial review. See, *e.g.*, *id.* at 35a ("[T]he Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the [petitioners'] Plant."). Petitioners cite no decision that has held or suggested that a Presidential determination of this nature, relying on confidential intelligence sources, may be second-guessed by a court.

Petitioners' reliance (Pet. 10-11) on prize cases and on the Trading with the Enemy Act, see 50 U.S.C. App. 9, is similarly misplaced. The law of prize, including the susceptibility to judicial review of a junior naval officer's assessment of the character of an enemy vessel, does not undermine the President's authority as Commander in Chief under Article II. See Pet. App. 33a, 37a-38a. Likewise, the fact that Congress has authorized judicial review of certain administrative designations, themselves made pursuant to the authority of a comprehensive statutory scheme administered by civilian officials, in no way suggests that courts can or should review the President's military decision to target and destroy property located outside the United States that he determines to be a threat to this Nation's security.

Finally, there is no basis for petitioners' assertion (Pet. 12) that judicial cognizance of claims such as theirs would "not adversely affect military decisionmaking." As the court of appeals recognized, it is unclear "how a military commander, much less the Commander-in-Chief, could

wage war successfully if he did not have the inherent power to decide what targets, *i.e.*, property, belonged to the enemy and could therefore be destroyed free from takings liability." Pet. App. 29a; see *id.* at 31a-35a, 38a-41a. The court properly declined "to add to the President's calculus concerns regarding takings liability when he exercises his power as Commander-in-Chief to wage war on behalf of the country under the circumstances that obtained in this case." *Id.* at 38a-39a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The El-Shifa Pharmaceutical Industries Company has no parent company, and its shares are not publicly traded.

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REPLY FOR PETITIONERS

The decision below foreclosed judicial review of Petitioners' takings claim based on an application of the political question doctrine that is overreaching and unnecessary but not unfamiliar. This Court reviewed and rejected a similar dismissal in deference to executive authority in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), reasoning that the President's designation of an individual as an enemy combatant is subject to judicial review. The decision below, in holding an executive designation of enemy property unreviewable in light of the political question doctrine, cannot be reconciled with *Hamdi*.

The Government contends that that blatant conflict does not warrant this Court's attention, because neither *Hamdi* nor the decision below phrased their holdings in terms of generally applicable rules regarding review. It argues first that the Federal Circuit did not articulate a broad rule of unreviewability in conflict with *Hamdi*, but only diverged from *Hamdi*'s result on a different set of facts. That facile distinction is unavailing. *Hamdi* rejected the very arguments in favor of foreclosing judicial review that the Federal Circuit embraced. *See* Pet. 7-8. The conflict is direct and apparent. The Government likewise insists that "*Hamdi* did not announce a categorical rule that determinations by the President and others in the realm of military affairs are *always* subject to judicial review." Opp. 6 (emphasis in original). Whatever label the Government applies to the holding in *Hamdi*, that decision unarguably articulated a principle in direct conflict with the decision below: That an executive designation of enemy status is not immune from judicial review simply because it touches upon a political determination.

1. But for the application of the political question doctrine, Petitioners stated a valid takings claim. Petitioners' takings claim survived dismissal on every issue except the political question doctrine. The Government

attempts to shift the focus by arguing that Petitioners' complaint should have been dismissed on other grounds. Opp. 5-9. Yet both issues the Government presents as obstacles to review in this Court were resolved in Petitioners' favor in the courts below, and neither is the subject of a cross-petition by the Government. The Government attempts to revive the issue of subject matter jurisdiction, arguing that the Reciprocity Act prevents the Court of Claims from hearing a takings claim brought by a citizen of the Sudan. Opp. 5 n.1. The Government also revisits the issue of standing, insisting that "petitioners have no rights under the Just Compensation Clause" because they are nonresident aliens whose property was located outside the United States. Opp. 7-8 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). The Government made both arguments, unsuccessfully, in the courts below. The Federal Circuit termed the Reciprocity Act argument the "weakest" of the Government's grounds for dismissal (App. 12a), and it declined to overrule *Turney v. United States*, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953), in which the Court of Claims awarded just compensation under the Takings Clause for the seizure of a nonresident alien's overseas property, on the basis of *Verdugo-Urquidez*. App. 9a ("[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States.").

No more availing is the Government's list of military takings cases in which an award of compensation was denied after full review or reversed on appeal. Opp. 8. The likelihood that Petitioners' claim will succeed on its merits is not before this Court. Petitioners cite *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952), *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969), *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), and *Amer. Mfrs. Mut. Ins. Co v. United States*, 453 F.2d 1380 (Ct. Cl. 1972), not to establish their ultimate entitlement to

compensation, but instead to demonstrate the general *availability* of a takings claim arising from military destruction of property and the propriety of judicial review of the facts on a case-by-case basis. *Caltex*, 344 U.S. at 156.

The Government's suggestion that Petitioners' claim is legally flawed is premature. Petitioners were denied the opportunity to present their claim for review – indeed, they were denied the opportunity even to demand an answer to their complaint – based solely on the application of the political question doctrine. It is the proper application of that doctrine on which Petitioners seek this Court's review.

2. The Federal Circuit's application of the political question doctrine conflicts with the right to judicial review established in *Hamdi*. The Government's insistence that the decision below presents no conflict with *Hamdi* (Opp. 5-6) ignores the necessary implication of *Hamdi*: That after-the-fact judicial review of an executive determination of enemy status poses no threat to executive authority, infringes upon no question entrusted to the Executive Branch for resolution, and consequently provides no basis for invoking the political question doctrine. The Government nevertheless maintains that *Hamdi* did not establish that a federal court "may review and potentially reject the President's determination that a particular facility was enemy property." Opp. 6. In fact, *Hamdi* stands for precisely that proposition.

Hamdi sanctioned judicial review of an executive determination of enemy combatant status despite the Government's arguments that such review would interfere with the President's prerogative as Commander in Chief. Pet. 7. As *Hamdi* suggests, after-the-fact review does not require "judicial supervision" (App. 24a, 32a) or "second-guess[ing]" (Opp. 10, App. 76a) of executive decision-making. Nothing in *Hamdi* limits the President's authority to make enemy status determinations based on intelligence he deems appropriate, just as nothing in Petitioners'

complaint purports to restrict the President's authority to make enemy property designations or targeting decisions.[1] *Hamdi* considered a different question: whether the very nature of a presidential enemy status designation was sufficient to nullify any challenge to its factual basis. This Court held that it was not: "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Hamdi*, 124 S. Ct. at 2651. Because the Federal Circuit "simply presumed correct" President Clinton's designation of the El-Shifa plant as enemy property and invoked the political question doctrine to deny Petitioners "any opportunity . . . to demonstrate otherwise," the decision below is in direct conflict with *Hamdi*.

3. Judicial review of takings claims does not constrain military decision-making. As further justification for depriving Petitioners' takings claim of judicial review, the Federal Circuit cited its reluctance to interfere with the "exigencies of waging war on the battlefield." App. 34a. The Government invokes the same concern for protecting military operations from judicial interference. Opp. 10-11. That fear is unwarranted given the extraordinary set of circumstances that must combine to give rise to a takings claim like Petitioners' (Pet. 11), and given the federal courts'

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[1] Indeed, the "legitimacy or authority of the Government's action must be conceded in takings proceedings." App. 72a. Because Petitioners' claim accepts the exercise of executive authority as proper, judicial review of that claim does not require a federal court to evaluate or supervise, much less limit, the exercise of that authority. A federal court deciding Petitioners' takings claim will be asked to do nothing more than consider whether El-Shifa was in fact owned or controlled by an enemy, and if not, whether Petitioners are entitled to compensation for the loss of their property. In other words, their complaint asks the federal courts only to address "the risk of erroneous deprivation" of a property interest, *Hamdi*, 124 S. Ct. at 2649, and, if appropriate, to afford a remedy.

long history of reviewing more commonly raised enemy status determinations without detriment to military operations.

The Court of Federal Claims has reviewed designations of enemy and enemy property status for error since the Civil War Era. *See, e.g.*, *Bond v. United States*, 2 Ct. Cl. 529, 535 (1866) (deciding, on the facts, whether claimant had "given aid or comfort to the recent rebellion"); *Harrison v. United States*, 6 Ct. Cl. 323 (1870); *LaPlante v. United States*, 6 Ct. Cl. 311 (1870); *Hill v. United States*, 8 Ct. Cl. 470 (1872) (determining whether nonresident aliens had aided the Confederacy or were entitled to compensation for their seized property). Likewise, the district courts have reviewed direct challenges to the President's enemy property determinations since the First World War, pursuant to the review provision of the Trading with the Enemy Act ("TWEA"), Pub. L. No. 65-91 § 9, 40 Stat. 411, 419 (1917) (codified at 50 U.S.C. App. § 9).[2] *See, e.g.*, *Von Zedtwitz v. Sutherland*, 26 F.2d 525 (D.C. Cir. 1928) (affirming district court's conclusion that claimant presented insufficient evidence in support of challenge to Custodian's seizure of property). This Court recognized that some avenue for review of an executive determination of enemy status "in case of mistake," far from raising political questions, was constitutionally mandated. *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566 (1921). *See also Stoehr v. Wallace*, 255 U.S. 239, 245 (1921).

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[2] The Government's suggestion that the judicial review authorized by the TWEA is irrelevant because enemy property designations under that statute are "made pursuant to the authority of a comprehensive statutory scheme administered by civilian officials" (Opp. 10) ignores the fact, recognized by the Court in *Stoehr v. Wallace*, that an enemy property designation and seizure made by the property custodian under the TWEA "is in effect the act of the President." 255 U.S. 239, 245 (1921).

The Government dismisses Petitioners' analogy to the TWEA as inapposite, arguing that executive determinations of enemy status under that Act are nothing more than "administrative designations," derived not from the President's Article II authority as Commander in Chief but from war powers delegated by Congress. Opp. 10. That argument misses the point. Executive seizures of enemy property under the TWEA were critical to the war effort. In order to review the facts supporting those seizures, the district courts necessarily considered the same complex security issues and sensitive factual questions that the courts below rejected as non-justiciable. App. 34a.[3] Even more importantly, TWEA claimants would have been entitled to bring takings claims had Congress not provided a parallel process in the district courts under the TWEA. The Government advanced this very point in defending an interpretation of an amendment to the TWEA that would have precluded foreign nationals from suing for restoration of their property: "To avoid conflict with the constitutional prohibition against the taking of property of friendly aliens without just compensation . . . the Custodian suggests that appellant may obtain just compensation . . . in the Court of Claims." *Uebersee Finanz-Korporation v. Markham*, 158 F.2d 313, 314 (D.C. Cir. 1946). The Supreme Court rejected the Government's proffered interpretation but acknowledged that the Fifth Amendment would afford non-enemy aliens the right to seek just compensation in any event. *See Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 487-88

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[3] *See, e.g., Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 484-85 & n.3 (1947) ("[i]t was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral" and that "some of the most dangerous of the Axis-influenced enterprises [were] Swiss, Dutch, Swedish or American.") (internal quotation marks omitted).

(1947) (hesitating to "assume that Congress treated all non-enemy nations, including recent allies, in such a harsh manner, *leaving them only with such remedy as they might have under the Fifth Amendment*") (emphasis added). *See also Silesian-American Corp. v. Markham*, 156 F.2d 793, 797 (2d Cir. 1946) (holding that, even if a friendly alien cannot reclaim property under the TWEA, he cannot be deprived of it without payment of just compensation) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). Thus, the Government correctly notes that a friendly alien's opportunity to obtain *restoration* of property erroneously designated under the TWEA is merely Congressionally authorized, but the opportunity to obtain *compensation* for the same erroneous designation is constitutionally required.

Petitioners do not dispute that the President must be free to act upon reliable national security intelligence in deciding to destroy property he reasonably believes to be that of an enemy, even if that intelligence ultimately proves false. What Petitioners seek is not judicial supervision of the executive decision-making process, but rather an opportunity to demonstrate that the destruction of the El-Shifa plant was mistaken, although authorized – and therefore compensable. That opportunity poses no threat to military decision-making. As this Court explained in *Hamdi*, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" involving executive designations of enemy status. 124 S. Ct. at 2649-50. Nothing in *Hamdi*, and no argument pressed by the Government here, suggests that that principle applies with less force to designations of enemy *property* status than to those of enemy combatant status.

CONCLUSION

For these reasons, as well as those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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